Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF

THE UNITED STATES

JEAN LEONARD HARRIS- PETITIONER

vs.

Sandra Wittman, an individual; Jack Swain, an individual; Pyle Simms Duncan & Stevenson, a Professional Corporation; Grant & Zeko, a Professional Corporation- RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

This Court has declared, absent an independent basis for jurisdiction, there is no federal jurisdiction over breach of contract claims even when the contract is a settlement agreement reached in federal court. [*Kokkonen v Guardian Life Ins. Co. of America,* 511 U.S. 375 (1994)] Did the Ninth Circuit error by articulating an independent basis for federal bankruptcy court jurisdiction is an action against a trustee for breach of a settlement agreement? This error accomplishes bankruptcy court jurisdiction over contract matters not within the jurisdiction of District Courts. Additionally, this mistaken view erodes the province of Art. III courts and thereby denies to Petitioner his right to a jury trial before an Art. III court on his state law claims.

II.

This Court's precedent requires the question of federal jurisdiction to be determined from the well-pleaded complaint rule. [*Caterpiller Inc. v Williams,* 482 U.S. 386 (1987)] Did the Ninth Circuit erode the province of Art. III courts when it concluded that Congress created 28 U.S.C. §157(b)(A)(2), "matters concerning the administration of the estate," to bring *all* common law claims against a bankruptcy trustee under bankruptcy court jurisdiction? This mistaken interpretation circumvents the well-pleaded complaint rule and Petitioner's right to a jury trial.

III.

This court opined in *Mosser v Darrow*, 341 U.S. 267 (1951), that a bankruptcy trustee can escape personal liability by first obtaining instructions from the court. Was the Ninth Circuit correct in finding a quasi-judicial immunity defense available for a bankruptcy trustee because the unlawful conduct, which supports Petitioners state court claims against the trustee, was afterward incorporated by the bankruptcy court into a post accrual administrative order? This reasoning assumes Congress intended to give bankruptcy courts authority to approve unlawful conduct as "administration of the estate"and thereby make it impossible for Petitioner to exercise his right to a jury trial on his common law claims before an Art. III judge.

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OPINIONS BELOW

The opinion of the United States court of appeals, Ninth Circuit, appears at Appendix A to this petition and is reported at 07-56310 (9th Cir. 12-21-2009)

The opinion of the Unites States district court appears at Appendix B to this petition and is reported at S.D. Cal. 8-21-2007.

The bankruptcy court issued Findings of Fact and Conclusions of Law that are contained within the Record.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 21, 2009. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is involved under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States Art. III:

"Section 1. The judicial Power *of the United States*, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...." (emphasis added)

"Section 2. The judicial Power shall extend to all Cases... arising under this Constitution, Laws of the United States ... (enumerated circumstances)

2. Judiciary Act 1789:

"Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that the Supreme Court of the United States shall consist of a chief justice and ....."

"Section 2. *And be it further enacted,* that the United States shall be, ... divided into thirteen districts..."

"Section 3. *And it be further enacted,* that there be a court called a District Court in each of the aforementioned districts, ..." (emphasis as stated)

3. The Constitution of the United States

Amendment V.

"No person shall be ... deprived of ...property, without due process of law; nor shall private property be taken for public use without just compensation."

4. The Constitution of the United States

Amendment VII.

"In Suits at common law, ..., the right of trial by jury shall be preserved..."

5. The Constitution of the United States

Amendment IX.

"The enumeration of the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

6. The Constitution of the United States

Amendment X.

"The powers not delegated to the United States by the Constitution, ... are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

Summary:

Petitioner entered into a Settlement Agreement with Respondents- a bankruptcy trustee and her agents. Petitioner's claims state Respondents breached the Settlement Agreement, committed fraud upon Petitioner and violated their fiduciary duties to Petitioner. To these claims, United States Supreme Court precedent is clear- the Seventh Amendment assures that Petitioner is entitled to a jury trial before an Art. III judge.

The Judiciary Act of 1789 establishes certain District Courts as Art. III courts with jurisdiction over "a Case, in Law or Equity, arising under the Constitution, or the Laws of the United States." Art. X preserves all jurisdiction over state law claims to the states.

The Ninth Circuit wrongfully affirmed an Art. I bankruptcy court assumption of jurisdiction over Petitioner's claims and the dismissal of said claims. In doing so, the Ninth Circuit ignored the "well-pleaded complaint rule," misinterpreted the Bankruptcy Act and disregarded Petitioner's Fifth and Seventh Amendment rights.

This Court's precedent clearly prescribes that to determine which Art. III court will hear the

matter requires an examination of jurisdiction using the "well-pleaded complaint rule." Under no statute, yet to be examined by this Court, has Congress attempted to preempt litigation against a trustee. The Ninth Circuit opinion fails to explain its avoidance of the well-pleaded complaint rule. The opinion ignores controlling precedent and interprets an act of Congress as having divested Petitioner of his Seventh Amendment right and right to have that jury before an Art. III judge.

Using the well-pleaded complaint rule, it is not possible to find federal jurisdiction over Petitioner's complaint. Because of this fact, the opinions under review do not mention the rule.

The Ninth Circuit opinion under review erodes Art. III powers by returning to the jurisdiction of a bankruptcy court state court claims this Court specifically determined Congress is without power to adjudicate under Art. I. As a result, the opinion is in conflict with this Court's precedent and other faithful Circuit courts.

The opinion also departs from accepted and usual judicial proceedings. This departure will be precedent for future digressions by lower courts inclined to circumvent the well-pleaded complaint rule and its limits upon federal jurisdiction. To accomplish this, the Ninth Circuit addressed a

circuitous idea shared with two other Districts- that a *post petition* settlement agreement with a trustee does not fit within this Court's *Marathon* prohibition, is a "public contract" which eliminates Petitioner's Seventh Amendment right, and also involves "arising in" a Title 11 case federal jurisdiction. With this reasoning the Ninth Circuit found "core" bankruptcy jurisdiction pursuant to 28 U.S.C. §§1334(b) and 157(b)(2)(A).

The Ninth Circuit then went further with this creative idea. The Court reasoned, if the bankruptcy court agrees to incorporate Respondents' acts of malfeasance into a "post accrual" of claims order, as did the bankruptcy court in Petitioner's matter, the incorporation of this misconduct[1] into said order *preserves jurisdiction* to the bankruptcy court over Petitioner's state law claims arising from said conduct. The Court reasoned this is so because with said order the wrongful acts are now "intertwined" with "the administration of the estate" under 28 U.S.C. §157(b)(2)(A).

This convoluted departure assumes that the unlawful conduct alleged by Petitioner is conduct Congress has the authority to define as "the administration of the estate." The Ninth Circuit

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[1] In this case, the order was called a "363 sale"

opinion fails to recognize that *ex parte* conduct is *outside* the authority Congress may permit. The clandestine scheme described in Petitioner's complaint is not a "*proceeding* arising ...in...cases under title 11," [28 U.S.C.§1334(b)] or something Congress can define as "administration of the estate" within 28 U.S.C.§157.

Precedent provides that the post-accrual order issued in this case was in violation of the Settlement Agreement and void for any purpose. Congress is without authority under Art. I to grant power to issue such an order in a bankruptcy court.

A. The Settlement Agreement With Respondents In Bankruptcy Court.

On November 22, 2002, Petitioner Harris, then a debtor in a bankruptcy 7 matter, entered into a Settlement Agreement with Respondents. The Agreement was entered on November 19, 2002, as an order of the bankruptcy court. The Settlement Agreement, titled "Term Sheet," was signed by all Respondents and provided in part that Harris [his Estate[2]] was to receive a storage facility called "Alpine Property" and a 300SL Mercedes. These

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[2] "Estate" is defined under the Bankruptcy Code as property owned by Harris on the date of his bankruptcy petition [11 U.S.C § 541(a)(1)]

assets were then held by Sandra Harris.[3]

The Mutual Release of Claims was thereafter signed by Harris, Wittman and Swain incorporating the Settlement Agreement [Term Sheet]. The Mutual Release provides it is binding on the parties, including their attorneys, and further states "the Parties agree this Agreement is a complete release of all claims the Parties have against one another arising from the .... Bankruptcy."

B. Petitioner's State Court Complaint.

The complaint over which the bankruptcy court assumed jurisdiction was filed by Harris on May 2, 2006, in the San Diego, California, Superior Court. Prior to this date, the discharge of debtor order for the Harris estate had been filed and the trustee Wittman had filed her final accounting for the Harris estate certifying, under penalty of perjury, that the estate was fully administered and divested of assets.

The facts stated within Petitioner's state court complaint allege Respondents violated various state laws between November 22, 2002, and May 1, 2003.

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[3] The Record reflects that these assets were transferred by Sandra to Wittman There is no evidence within the Record that the assets were thereafter transferred to Harris and/or his Estate The Harris complaint alleges the assets were never transferred to his Estate

C. Respondents' Violation of the Settlement Agreement.

The first breach alleged by Harris occurred shortly after November 22, 2002, when Respondents held the Alpine Property and the Mercedes for themselves instead of transferring these assets to Harris and his Estate (see footnote 3). While holding these assets for themselves, Harris alleges that Respondents pilfered the income of approximately $21,000 per month.[4]

The complaint goes on to state that the second breach arose between November 2002, and May 1, 2003, when Respondents entered into a secret written agreement providing that Respondents would transfer these assets to themselves and not release their claims against Harris and his Estate. Instead, the trustee would improperly agree to honor those claims and pay herself and the other Respondents approximately $1,000,000 in pretrial and trial fees and commissions and use those claims as the contrived consideration for said transfer. The entire agreement is alleged by Harris to also provide that the trustee would transfer the Alpine Property to Swain *nunc pro tunc* to November 19, 2002, a date

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[4] The Record of the Wittman final bankruptcy accounting shows that no deposits were ever made to the Harris Estate from income of the Alpine Property

preceding the Settlement Agreement[5], if the Swain Group paid to the Estate $125,000[6] and paid a lien on the property held by Sandra Harris. Finally, Harris alleges that Respondents transferred the Alpine Property and the Mercedes to themselves, sold them for approximately $3,500,000.00 and distributed the profit among themselves.

D. The Bankruptcy Court Decision:

On May 15, 2006, Respondents removed the San Diego Superior Court matter to the same bankruptcy court that handled Petitioner's bankruptcy petition. On June 30, 2003, said court had approved of Respondents *antecedent misconduct* which Petitioner alleged accrued his state law claims during the November 22, 2002, to May 1, 2003, period.

Respondents filed a motion to dismiss Petitioner's complaint. The bankruptcy court granted said motion on August 14, 2006.

The bankruptcy court's findings of fact and conclusions stated that said court had "core" bankruptcy jurisdiction over Petitioners state law claims under 28 U.S.C. §§ 1334 and 157 (b)(2)(A), (N)

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[5]To avoid accounting for the Alpine Property income.

[6] There is no evidence within the Record that Swain paid the $125,000 to the Estate

& (O). It is clear from the bankruptcy court findings [157 (N)- referring to "orders" for the sale of property] that the court ignored the "well-pleaded complaint" of Petitioner to focus on Respondents' defense. Respondents believe that because their unlawful conduct was incorporated into their June 30, 2003, "363 sale" order they are entitled to immunity from Petitioner's claims. Petitioner appealed.

E. The District Court Decision:

The District Court affirmed the bankruptcy court's finding of "core" jurisdiction under 28 U.S.C. §§1334 and 157(b)(2). Relying upon *In re Harris Pine Mills,* 44 F.3d 1431, 1435 (9th Cir. 1995), said court misconstrued Petitioner's complaint as dealing with the June 30, 2003, "363 sale" of the assets to Respondents. Ignoring Petitioner's well-pleaded complaint the District Court opined that like *Harris Pine Mills*, Petitioner's claims are "inextricably intertwined with the trustee's sale of property belonging to the bankruptcy estate." Petitioner's complaint makes no mention of said "sale."

The District Court affirmed the bankruptcy court's decision to dismiss based upon the *Barton* doctrine and derived judicial immunity. Petitioner appealed to the Ninth Circuit.

F. The Ninth Circuit Decision: Erodes The Province Of Art. III Courts By Interpreting An Act Of Congress As Preventing Petitioner From Obtaining A Jury Trial Before An Art. III Judge On His State Law Claims Against A Bankruptcy Trustee.

In *Northern Pipeline Co. v Marathon Pipe Line Co., supra*, addressing a pre-petition contract, the Supreme Court made it clear that Congress is without power to extend bankruptcy court jurisdiction over a state law breach of contract action. In *dicta*, within *Thomas v Union Carbide Agric. Prods. Co.,supra*, this Court commented that *Marathon* referred to "traditional" contracts.

The Ninth Circuit has now defined "traditional" for this Court and determined that Petitioner's Settlement Agreement with Respondents is not a "traditional contract" referred to in *Thomas*. The Ninth Circuit concluded that Petitioner's Settlement Agreement was not the "traditional contract" referred to therein because 1) it was made with the trustee; 2) the Agreement is a post-petition contract whereas *Marathon* addressed a pre-petition contract; and 3) the terms of the Settlement Agreement directly relate only to the administration of the Estate matters under 28 U.S.C. §157(b)(2)(A)- matters concerning the administration of the estate. [Appendix A, p.16673]

Without explanation, the Ninth Circuit also distinguished Petitioner's circumstance from that addressed in *Marathon,* by stating that the First Circuit's reasoning in *In re Arnold Print Works*, 815 F.2d 165 (1st. Cir. 1987) was equally applicable in that a settlement agreement with a bankruptcy trustee "is much more like a public rights case" to which Petitioner would have no right to a jury trial.

With these conclusions and without any evidence that Congress has intended to preempt claims against a bankruptcy trustee to bankruptcy jurisdiction or to incorporate the conduct alleged by Petitioner into "administration of the estate," the Ninth Circuit has created a *de facto preemption.* The inescapable conclusion is that this Ninth Circuit panel believes Congress intended that all settlement agreements with a trustee are "public contracts," exempt from the well-pleaded complaint rule and Petitioner's right to a jury trial before an Art. III court.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to halt what has become a growing attempt among Circuit courts to achieve what this Court sought to prevent Congress from accomplishing in *Marathon*· the erosion of Art. III power through expansion of Congress' Art. I bankruptcy jurisdiction over common law claims. The Ninth Circuit interpreted an act of Congress, not examined in *Marathon,* to expand Art. I power over Petitioner's common law claims against a trustee. In doing so, Petitioner has been denied his Seventh Amendment right to a jury trial.

This case also presents an opportunity to clarify the scope of a trustee's liability for *ex parte* acts during the administration of the estate and Congress' power to excuse such acts. Personal liability of a trustee was announced but left undefined in *Mosser v Darrow, supra.*

These matters are in conflict among circuit opinion and present serious constitutional and policy issues in need of resolution.

A. The Ninth Circuit Erred By Interpreting 28 U.S.C.§1334, And Then 28 U.S.C. §157(b)(2)(A), to Circumvent The Constitutional Limitations Upon Bankruptcy Court Jurisdiction Stated In *Marathon*.

There has been no expression from Congress, nor could there be, to preempt common law claims against a bankruptcy trustee. Notwithstanding the absence of this expression, and without evidence of Congress' intent to do so, the Ninth Circuit has interpreted Congress' enactment of 28 U.S.C.§§1334 and 157 as incorporating all post petition common law claims against a trustee and thereby fall within the jurisdiction of a bankruptcy court. This interpretation leaves Petitioner without recourse to an Art. III court and jury on his state law claims against Respondents.

This Ninth Circuit panel first interpreted 28 U.S.C. §157(b)(2)(A), as embracing unlawful conduct within an "administrative act" *if* the acts of malfeasance are set forth in an order of the bankruptcy court. In this case that order was to "sell" the assets in question to Respondents instead of depositing them into the Estate as required by the Settlement Agreement. [App. A, p.16672] The Ninth Circuit opined, if such an order is issued the bankruptcy court can then exercise jurisdiction over state law claims against a trustee arising out of the

conduct set forth in said order and dismiss those claims because of quasi-judicial immunity. The end result is that Petitioner's "suit at common law," will have no recourse before an Art. III court and jury simply because the trustee incorporated the unlawful conduct into an order of the bankruptcy court.

What the Ninth Circuit panel mistakenly overlooked is that Congress does not have power under Art. I to include unlawful conduct as defined conduct within any expressed statute. When a trustee behaves as Petitioner has alleged the trustee is no longer "administering" the estate nor involved in a "civil *proceeding*...arising in...cases under title 11." [28 U.S.C.§1334(b)] A *proceeding* under title 11 may include administrative matters such as allowance and disallowance of claims but a *proceeding* definitely is not the *ex parte* scheme described in Petitioner's complaint. When Respondents did what is described in the complaint they were not acting with Congressional authority.

At least two Circuits have addressed the issue of whether Congress has preempted suits against a trustee defendant and disagree with the Ninth Circuit's *de facto* preemption theory. [*In re Guild and Gallery Plus, Inc.* 72 F.3d 1171, 1182 (3rd Cir. 1996); *Robinson v Michigan Consol. Gas Co. Inc.* 918 F.2d 579, 585 (6th Cir. 1990)- Congress has not

"preempted the area of suits against a trustee in bankruptcy as to dispose of the jurisdictional requirement of a well-pleaded complaint."]

This Ninth Circuit decision cannot stand because:

1) Naming a trustee as a defendant always brings into play 28 U.S.C.157§(b)(2)(A), since all right *and wrong* conduct of a trustee occurs during the administration of the estate. Congress does not have constitutional power to preempt claims of a trustee's wrongdoing. To preempt such claims or to absorb unlawful conduct within the expression of "administration of the estate" [28 U.S.C.§157], invades the jurisdiction of Art. III courts and denies Petitioner his right to a jury.

2) 28 U.S.C.§1334(b), cannot be interpreted as an expression of Congress to give "exclusive" jurisdiction to bankruptcy courts, to mean "during" for "arising in" or that a "proceeding" includes a common law claim against a trustee. In doing so, the Ninth Circuit has a) granted bankruptcy jurisdiction over common law claims this Court specifically held in *Marathon* was reserved for Art. III courts; b) created a special *exclusive* "arising in" jurisdiction for trustee defendants when §1334(b) does not provide for same; and, c) prevented Respondents from ever answering before an Art. III court and jury

on Petitioner's uncontradicted claims.

3) Congress has the power to define "civil proceedings rising in ... cases under title 11" federal jurisdiction [28 U.S.C. §1334(b)], as administrative matters such as allowance and disallowance of claims but does not have the power to include unlawful conduct of a trustee within that definition. Finding bankruptcy "core" jurisdiction simply because the events causing the accrual of the state law claims occurred *during* the administration of the estate [157(b)(2)(A)] and interpreting Petitioner's claims as a "proceeding" arising in title 11 "will radically expand the class of removable cases; and it would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine." [*Holmes Group v Vorando Aircirculation,* 535 U.S. 826, 832 (2002)];

4) The Supreme Court has already stated that *even if* there is "core" bankruptcy jurisdiction this finding does not mean that Petitioner's Seventh Amendment right to a jury trial before an Art. III judge can be ignored. [*Granfinanciera, S.A. et al vs. Nordberg, creditor Trustee For the Estate of Chase & Sanborn Corp etc.* 492 U.S. 33 (1989)- "Congress lacks the power to strip parties who are contesting matters of private right of their constitutional right to a jury trial"];

5) For this Court's opinion in *Marathon* to have substance, all Circuit courts must accept this precedent to apply to all contracts with debtor be they pre-petition, post-petition, with or without a trustee, and with or without being "intertwined" with an administrative act of the trustee;

6) Naming a trustee as defendant cannot do away with the well-pleaded complaint doctrine. A violation of state law must have a remedy and be treated uniformly before an Art. III judge and jury; and,

7) A trustee must be personally liable for *ex parte* acts that injure debtor. The bankruptcy court does not have the power to strip Petitioner of his state law claims against Respondents through the device of issuing any order encompassing unlawful conduct. Such an order is void *ab initio*.

If left standing, this Ninth Circuit opinion will combine with a growing number of other Circuit Court opinions to erode limitations upon the jurisdiction of Art. I tribunals, eliminate settlement agreements with bankruptcy trustees as an option for dispute resolution, leave debtors without recourse against a dishonest trustee, and eliminate a trustee's personal liability for violations of state law.

B. The Ninth Circuit Belief That Respondents' Settlement Contract With Petitioner Is Not A "Traditional Contract" Erodes Art. III Jurisdiction Protected In This Court's *Marathon* Decision.

The Ninth Circuit found bankruptcy "core" jurisdiction over the Harris state court claims by concluding that a settlement agreement with a bankruptcy trustee is not a "traditional contract" referred to within *dicta* of *Thomas v Union Carbide Agric. Prods. Co. supra* at 584. The Ninth Circuit relied upon the fact that this Court has only, by the circumstances of *Marathon,* considered pre-petition contracts in the bankruptcy setting. Since all settlement agreements are post-petition agreements, the Ninth Circuit opined this non-traditional contract could only "arise in" bankruptcy.[7] [App. A p. 16667 & 16673]

The Ninth Circuit reasoned that *Marathon* was "clarified" in *Thomas* (*dicta*) when this Court stated that the *Marathon* prohibition addressed "traditional" contracts. Since the Supreme Court did not further define what was meant by "traditional," the Ninth Circuit has filled that void by declaring a settlement agreement, made under the supervision of the bankruptcy court with the trustee as a party,

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[7]But, federal jurisdiction under 28 U S C §1334(b) is *not exclusive.* State courts have concurrent jurisdiction

is not a "traditional" contract to which the *Marathon* opinion applies. [App. A, p.16673]

Understanding that all bankruptcy settlement agreements will involve the trustee and/or debtor, the Ninth Circuit opinion leaves several unanswered issues. First, Petitioner's claims address the *breach* of the contract and not the creation of the contract. While the creation of the Settlement Agreement may be an administrative act the breach of that agreement certainly is not an administrative act under the supervision of the bankruptcy court. Second, this Court has declared that a settlement agreement made under the supervision of the District Court involving those parties under the jurisdiction of that court, confers no federal jurisdiction over subsequent agreement disputes. Those contract disputes are for state court resolution. [*Kokkonen, supra* at 377-378] Therefore, the Ninth Circuit is without precedent or statutory authority to find a settlement agreement reached in bankruptcy court is not a "traditional contract" to which *Marathon* and *Kokkonen* apply. The only difference between Petitioner's matter and *Kokkonen* is that a trustee is a party defendant.

To point out the Ninth Circuit's focus upon a trustee named as a defendant as the basis of its non-traditional contract finding, one only need review the

Ninth Circuit opinion of *Hinduja v Arco Products Co.* 102 F.3d 987, 989-990 (9th Cir. 1996). The events in *Hinduja* are identical to those presented herein. The debtor entered into a settlement agreement with a creditor and a dispute over the agreement emerged. That Ninth Circuit panel opined 28 U.S.C.§1334(b), *does not* provide exclusive jurisdiction to the District Court and bankruptcy courts. Simply because the settlement agreement was "administered" by the bankruptcy court and an order on the agreement was issued does not mean that a breach of contract action on said agreement could not be vented in state court. The court also assumed the bankruptcy court *had* retained jurisdiction over the agreement and held that the order on the agreement does not preempt state court enforcement. The *Hinduja* panel could not find anything untraditional about a settlement agreement reached with the debtor and a creditor. The only difference between the *Hinduja* decision and the case at hand is that one of the Respondents [Wittman] is a trustee.[8] This is a difference without foundation under the Constitution or statute inasmuch as Congress has not preempted litigation against a bankruptcy trustee. [*Robinson*, supra at 585]

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[8]The remaining Respondents are creditors of the estate

C. The Ninth Circuit Opinion Creates Confusion and Conflict Over How A Bankruptcy Court Derivatives Jurisdiction Over a Settlement Agreement Dispute, When District Courts Have No Such Jurisdiction.

This Court held in *Kokkonen v Guardian Life Ins. Co. of Amer., supra*, that "federal courts are courts of limited jurisdiction (and) it is presumed that a cause lies outside this jurisdiction." [*Id* at 377] Absent retained jurisdiction[9], or some independent basis for jurisdiction, there is no federal jurisdiction for breach of contract even if consideration for the contract is dismissal of an earlier federal suit. " [*Id* at 378]

The Ninth Circuit opinion under review creates a conundrum if, under United States Supreme Court precedent, the District Court is without jurisdiction under any statute to address a breach of contract claim over a settlement agreement ordered in that court because "that power authorized by Constitution or statute" [*Id* at 377] does not exist. The Ninth Circuit opinion ignores *Kokkonen*.

To find federal jurisdiction over settlement contracts, not possible in District Courts, the Ninth Circuit first found that the allegations made by

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[9]The bankruptcy court did not retain jurisdiction over Petitioner's settlement agreement

Petitioner fall within conduct defined by Congress as a "civil *proceeding* ... arising in... cases under title 11." [28 U.S.C.§1334(b); App. A, p.16667] From this finding the Court reasoned that Petitioner's claims thereby fit within the scope of "administration of the estate" core jurisdiction under 28 U.S.C. §157(b)(2)(A). [App. A. p. 16669] As previously stated, this interpretation of Congressional intent assumes the impossible. Congress does not have the power to create a bankruptcy system that behaves as Petitioner has alleged in his complaint.

Additionally, the Ninth Circuit opinion leaves unanswered an issue recognized by other Circuits and at least one Ninth Circuit panel in conflict with the present Ninth Circuit opinion. To exercise those powers granted under Section 157 requires, as a prerequisite, District Court jurisdiction under 28 U.S.C. §1334. [*Dunmore v* U.S., 358 F.3d 1107, 1113 (9th Cir. 2004; *In re Frietz,* 852 F.2d 455, 457 (9th Cir. 1988)- "If the District Court has no jurisdiction over a particular proceeding, then neither does the bankruptcy court. See, 28 U.S.C.§157"] Since a District Court has no jurisdiction over a breach of contract dispute because said jurisdiction is not a "power authorized by Constitution or statute" [28 U.S.C. §§1331 or 1334] a bankruptcy court cannot have "arising in" jurisdiction under 1334.

This Court has repeatedly held that for there to be federal jurisdiction over Petitioner's complaint, *following the well-completed complaint rule,* the claims must "arise under" *federal law.* To "arise under" federal law, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Gully v First National Bank in Meridian*, 299 U.S. 109, 112 (1936) ... By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States ..." [*Franchise Tax Bd. v Laborers Vacation Trust,* 463 U.S. 1, 11-13 (1983)]

Petitioner's state court claims do not "arise under" federal law. Petitioner's right to claim damages from Respondents is a common law right not a "right created by... laws of the United States." Petitioner's allegations are deemed true and do not describe a civil proceeding under title 11 or lawful administration of the estate.

The Ninth Circuit opinion cannot be allowed to remain as precedent. Bankruptcy courts cannot exercise jurisdiction over settlement agreement *disputes* that do not "arise under federal law" just as District Courts cannot exercise jurisdiction over settlement agreement disputes because they do not

arise under federal law.

This confusion, created by the opinion under review, requires clarification by this Court because on Petitioner's state law claims there should be no dispute regarding Petitioner's right to a jury trial before an Art. III judge.

D. The Ninth Circuit's Idea That Petitioner's Claims Arose *During* His Bankruptcy And Are Therefore "Core" Jurisdiction Bankruptcy Matters "Arising In" Bankruptcy Is A Theory Of Bankruptcy Jurisdiction In Conflict With Supreme Court Precedent And Other Circuit Courts.

The initial mistake of this Ninth Circuit panel is found in the caption "Harris' claim arose *in his Chapter 7 bankruptcy case*; therefore, the bankruptcy court could hear it." (emphasis added) The opinion goes on to explain that because the malfeasance alleged by Petitioner occurred *during* the trustee's administration of his estate there is bankruptcy jurisdiction. [App. B p. (16668]

The Ninth Circuit has confused a phrase of art "arising in... cases under Title 11" [28 U.S.C. 1334(b)] with the word "during." Petitioner's claims certainly accrued "during" his bankruptcy proceeding but do not "arise...under Title 11." If such were the case, *Marathon* would be meaningless. "... state-law

causes of action for breach of contract... are paradigmatic private rights." These private rights "lie at the protected core of Article III judicial power." [*Granfinanciera* at 56 referring to *Marathon* conclusion at 71]

What Congress intended by "civil proceedings ... arising in... cases under title 11" has not been addressed by this court. It is clear from the unambiguous language of 28 U.S.C.§1334 that the statute refers to "proceeding" and not a violation of state law.

In *Celotex Corp v Edwards*, 514 U.S. 300 (1995), this Court generally addressed the concept of "arising in" bankruptcy jurisdiction but *without definition*. Consistent with §1334 addressing "proceedings", Circuit Courts have continuously defined "arising in" core jurisdiction as referring to:

> "administrative matters such as allowance and disallowance of claims, orders in respect to obtaining credit, determining the dischargeability of debts, discharges, confirmation of plans, orders permitting the assumption or rejection of contracts, are the principal constituents of "arising in" jurisdiction, and that *in none of these* instances is there a 'cause of action' created by statute..." [*Stoe v Flaherty*, 436 F.3d 209, 218 (3rd Cir. 2006)- "state law claims can clearly exist

outside bankruptcy"; *See also, In re Wood*, 825 F.2d 90 (5th Cir. 1987)

In *Kokkonen v Guardian Life Ins. Co. of Amer, supra,* this Court did reject the idea that there is federal jurisdiction over a settlement agreement dispute simply because the settlement agreement "arose in" or "during" a pending federal matter. A different rule cannot apply to bankruptcy courts. See also, *Abbott Lab v CVS Pharmacy,* 290 F.3d 854 (7th Cir. 2002)- "the interpretation of a settlement contract is governed by state law even if the settled claim *arose under* federal law; otherwise a suit directly on the settlement agreement also would arise under federal law, and the holding of Kokkonen would be overthrown."

The Supreme Court has indirectly addressed the definition of a "proceeding" in bankruptcy over which that court has jurisdiction in the context of a trustee's action to set aside a fraudulent conveyance. In *Granfinanciera, S.A. v Nordberg, supra,* the Court opined that such a matter "constitutes no part of the *proceedings in* bankruptcy but concern *controversies arising out of it*" (emphasis added) which the Court went on to state are matters of private and not public rights. Thus, a controversy like Petitioner's may be a

matter arising out of a bankruptcy but constitutes no part of the *proceedings in* bankruptcy.

Other Circuit Courts have rejected the idea that there exists core bankruptcy jurisdiction simply because the claims accrued during the period of the bankruptcy. See, *Stoe v Flaherty*, *supra*, plaintiff sought bankruptcy jurisdiction over claim for severance benefit because claim "would not exist, *but for* the bankruptcy filing.... But claims that 'arise in' a bankruptcy case are claims that *by their nature*, not their *particular factual circumstance*, could only arise in the context of a bankruptcy case." (emphasis added); See also, *Chicago Pacific Corp. v Canada Life Assur. Co.* 850 F.2d 334, 336 (7th Cir. 1988).

The Ninth Circuit addressed the concept of "arising in"a bankruptcy by relying upon its equally flawed decision in *Harris Pine Mills*, 44 F.3d 1431 (9th Cir. 1995). In *Mills*, the court found core jurisdiction because the fraud and breach of contract claims against the trustee accrued *during* a noticed and conducted sale of estate assets. The claims were thus reasoned to be "intertwined" with an administrative act of the trustee. The decision below now extends the "intertwined" ("arose during") reasoning of *Harris Pine Mills* to *any claim against a*

bankruptcy trustee that "arose in" the pending bankruptcy. [App. A, p. 16667]

The Ninth Circuit opinion advances the position that Congress can encroach upon Art. III jurisdiction through the interpretation of an ambiguous Bankruptcy Code provision. The Ninth Circuit ignored *Marathon* because the panel opined that Petitioner's private common law claims fall within the ambiguous definition of "the administration of the estate" notion of §157(b)(2)(A). This Court's *Marathon* decision clearly stated that "Art. III bars Congress from establishing legislative courts to exercise jurisdiction over *all matters related to* those arising under the bankruptcy laws." Congress' Art. I power regarding these matters must be limited to "the core of the federal bankruptcy power... restructuring of the debtor-creditor relations." [*Marathon* at 71]

The Ninth Circuit has now interpreted Congress' grant of authority to bankruptcy courts under 28 U.S.C.§157(b)(2)(A), as including bankruptcy jurisdiction over *all state court claims* against a trustee because they are *related to* a matter arising under the Bankruptcy Code- "the administration of the estate." The opinion avoided

addressing the *Marathon* decision by simply stating that *Marathon* does not apply to a post-petition contract.

The Ninth Circuit opinion erodes Art. III jurisdiction precisely as this Court sought to prevent in *Marathon*. The opinion grants to bankruptcy court jurisdiction over all common law claims against a trustee with no nexus to Title 11 except that they accrued during a bankruptcy matter and in that respect might merely be "related to" the bankruptcy. [*Marathon* at 74- "The broad range of questions that can be brought into a bankruptcy court because they are related to cases under title 11... (erodes) Art. III jurisdiction by unilateral action of political Branches."]

The question of what matters are "proceedings arise in... cases under title 11" and the exclusivity of said bankruptcy jurisdiction are questions in need of clarification by this Court or further erosion of Art. III power will occur through transfers of power to bankruptcy courts.

E. The Ninth Circuit Opinion Adds This Circuit To A List Of Circuits Granting Bankruptcy Jurisdiction Over Post-Petition Contract Disputes.

To accomplish its end, the Ninth Circuit reached to the First Circuit for support of the idea that exercising bankruptcy jurisdiction over post-petition state law claims poses no constitutional issues raised by *Marathon* [*In re Arnold Print Works,* 815 F.2d 165, 170 (1st Cir. 1987)]. The Ninth Circuit stated the Settlement Agreement is a post-petition contract therefore this Court's opinion in *Marathon* is not applicable because it addressed a pre-petition contract. Additionally, the Ninth Circuit opined *Marathon* had no application because it was not a majority opinion of this Court. [App. A, p.16673]

Petitioner suggests that in the balance of constitutional rights to a jury trial before an Art. III judge, the Tenth and Eleventh Amendments, whether the contract is pre-petition or post-petition is meaningless. At least three Circuits have used the pre-petition/post-petition distinction to ignore *Marathon*. [See also, *In re U.S. Lines, Inc.* 197 F.3d 631 (2nd Dist. 1999)- "a bankruptcy court has core jurisdiction over claims arising from a contract

formed post-petition under 157(b)(2)(A)" (matters concerning the administration of the estate)]

Conflict now exists within Circuits over the application of *Marathon* to only pre-petition contracts or pre-petition accrual of claims. The Ninth, First and Second Circuits now opine that *Marathon* should be narrowly construed to only apply to pre-petition contract disputes and 28 U.S.C. §157(b)(2)(A), matters concerning the administration of the estate, should be broadly interpreted to include *all* post-petition contract disputes and *all* post-petition accrual of state court claims.

To add to the confusion and conflict, the Ninth, First and Second Circuits leave unanswered the issue acknowledged in other Circuits- that debtor's personal rights in a post-petition contract *are not assets of the estate* over which the bankruptcy court has any jurisdiction. [*In re Burgess*, 438 F.3d 493, 503 (5th Cir. 2006); *In re Bobroff,* 766 F.2d 797, 803 (3rd Cir. 1985)- the cause of action did not accrue until after filing the petition therefore not an asset of the estate]. This Court has also recognized that the term "property" of a bankruptcy estate does not include post-petition acquisition of property because "one purpose which is

highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future." [*Segal v Rochelle,* 382 U.S. 375, 379 (1966)]

Thus, a conflict among Circuit courts exists because three Circuits are of the opinion that a pre-petition settlement agreement with the debtor, which is an asset of the bankruptcy estate, administered by the court and trustee is a contract over which the bankruptcy court has *no* jurisdiction when a dispute over said contract *arises during* bankruptcy. [*Marathon* followed] However, these same Circuits believe that when a post-petition settlement agreement is reached with the debtor the bankruptcy court has exclusive jurisdiction when a dispute arises. Congress has not made this distinction and *Marathon* does not reveal an option to allow an intrusion into Art. III jurisdiction when the contract at issue was created post-petition.

In conflict with the Ninth, First and Second Circuit's opinion, the Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits interpret *Marathon* broadly and §157 narrowly. See, *Beard v Braunstein*, 914 F.2d 434 (3rd Cir. 1990)- "this is a garden variety contract claim and is not against the bankruptcy

estate...While we agree with the *Arnold* court that in fact *Marathon* was based on pre-petition conduct, there is no indication that either the plurality or the concurrence in *Marathon* relied on this distinction."; For similar opinion, See *Valley Historic v Bank of N.Y.*, 486 F.3d 831 (4th Cir. 2007); *Barnett v Stern*, 909 F.2d 973 (7th Cir. 1990); *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171 (3rd Cir. 1996); *Lathem v Wells Fargo Bank. N.A..*, 896 F.2d 979 (5th Cir. 1990); *Specialty Mills, Inc. v Citizens State Bank* 51 F.3d 770 (8th Cir. 1995); *In re Mystic Tank Lines, Corp.*, 544 F.3d 524, 529 (3rd Cir. 2008); *In re Wood*, supra at 92.

Whether or not Petitioner receives his day in court before an Art. III judge and jury should not depend on whether he presently resides in the Ninth Circuit or the Third Circuit.

F. The Ninth Circuit Erred By Finding Core Bankruptcy Jurisdiction Over Petitioner's Complaint When The Complaint Cannot be Shown To Be "Related To" The Closed Bankruptcy Case.

When Petitioner filed his state court complaint against Respondents, his bankruptcy matter was closed. The complaint seeks damages from

Respondents for violations of Petitioner's personal rights. Any recovery by Petitioner would go directly to him and not to his former Estate. Damages paid by Respondents would come from them personally and not from the closed Estate. So, if Petitioner's complaint cannot be shown to be "related to" his bankruptcy as "non-core" jurisdiction, the complaint cannot be shown to "arise in" bankruptcy to establish "core" jurisdiction.

This Court has yet to address the definition of "related to" [or "arising in"] bankruptcy jurisdiction. The Third Circuit definition, in *In re Pancor, Inc.*, 743 F.2d 984, 994 (3rd Cir. 1984), has been followed by several Circuits; "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the *outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy."* (emphasis as stated) This definition of "non-core" jurisdiction has been adopted by the Fourth Circuit [*In re A.H. Robins Co.*, 788 F.2d 994, 1002 n. 11 (4th Cir. 1985)], the Fifth Circuit [*In re Wood,* supra at 93], the Sixth Circuit [*Robinson v Michigan Consol. Gas Co. Inc.*, 918 F.2d 579, 583 (6th Cir. 1990)] the Eighth Circuit [*In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786 (8th

Cir. 1987), and even the Ninth Circuit [*In re Fietz,* supra at 457].

The Ninth Circuit opinion under examination fails to describe how 28 U.S.C. §157(b)(2)(A), can provide the higher standard of "core" bankruptcy jurisdiction over Petitioner's common law claims when it is impossible, under the *Pancor* definition, to establish that these claims are even "related to" his former bankruptcy.

G. Congress Has Not Given Bankruptcy Courts Power To Establish Jurisdiction Over State Law Claims By Ignoring The Well-Pleaded Complaint Rule.

To establish bankruptcy jurisdiction, the Ninth Circuit ignored Petitioner's well-pleaded-complaint. Instead, the Court went outside the four corners of the complaint to look at Respondents' defense theory. Respondents' defense to Petitioner's complaint is that their wrongful conduct was incorporated into an order of the bankruptcy court. This order was requested by and obtained by Respondents on June 30, 2003, as a "363 sale" order which transferred the assets at issue to Respondents rather than to Petitioner's Estate.

Since, in approving the "sale" order, the bankruptcy court approved the "contrived" conduct alleged by Petitioner, the Ninth Circuit reasoned Respondents conduct was "intertwined" with the sale order and thereby falls under "administration of the estate" from which the court has "core" jurisdiction under 28 U.S.C.§157(b)(2)(A). [App. A, p. 16670] This idea is a new theory for Circuit courts seeking to find bankruptcy jurisdiction over common law claims.

Notwithstanding the Ninth Circuit opinion, the post accrual "sale order" is a void order which may not be used to establish jurisdiction, immunity or for any purpose. The June 30, 2003, bankruptcy court order [transferring the assets to Respondents *nunc pro tunc* such that "they were never assets of the estate"] was clearly an order prohibited by the Settlement Agreement. See, *In re Continental Airlines Corp.*, 907 F.2d 1500 (5th Cir. 1990). The Fifth Circuit noted that the bankruptcy court first approved the settlement agreement. In a *nunc pro tunc* order the bankruptcy court set aside the earlier settlement order and entered an order forbidden by the original settlement agreement. The Fifth Circuit opined that there is no authority within the Bankruptcy Code that authorizes the bankruptcy

court to enter a subsequent order prohibited by the terms of a settlement agreement.

In *Seymour-Heath v Goggin*, 389 F.2d 327 (9th Cir. 1968), the court addressed facts identical to those now before this Court. The trustee entered into a settlement agreement with debtor. Thereafter, with others, the trustee entered into a second agreement the terms of which were prohibited by the settlement agreement. On motion the bankruptcy court approved the second agreement. The trustee opined it had administrative authority to compromise the first agreement. The Ninth Circuit opined that the settlement agreement order was binding upon the trustee and the bankruptcy court and neither had any authority under the Bankruptcy Code to enter a subsequent order prohibited by the settlement agreement.

In *Snell v Cleveland Inc.* 316 F.3d 822 (9th Cir. 2002), a settlement agreement resolved the first case. In a related matter a second judge reopened the first case and dismissed it. The court held the second judge was bound by the settlement agreement and was thereby without authority. The second court's action was void.

In *In re Ludlow Hospital Society, Inc.* 124 F.3d

22 (1st Cir. 1997), the court opined the general equity power of the bankruptcy court [105(a)]may not be used to alter debtor's rights under state law, to create substantive rights not otherwise available under the Code, or expand contractual obligations of parties.

In *Ex Party Harding,* 219 U.S. 363, 31 S.Ct. 324, 365 (1911), the Court observed, an order entered without statutory or discretionary authority is void. "The original removal petition... not only failed to show a removable case, but affirmatively showed that the case was not removable under the law... The orders... and all subsequent proceedings based thereon, where wholly without power or jurisdiction of the Circuit Court, and void."

Thus, the Ninth Circuit has created yet another conundrum; without the void June 30, 2003, order there is no basis upon which the Ninth Circuit can rely to support the idea that Respondents were merely involved in "selling assets within the administration of the estate." The Ninth Circuit opinion is based entirely upon the assumption that the June 30, 2003, order is valid. Congress has not given bankruptcy courts authority to issue orders forbidden by prior settlement agreements. The June

30th order is without authority and void.

Art. I does not empower Congress to give bankruptcy courts authority to issue orders that approve violations of non-bankruptcy law. Other Circuits and precedent agree with this axiom. The Ninth Circuit opinion under review is in conflict with this precedent and needs clarification.

H. The Bankruptcy Court Order Of June 30, 2003, Was a Taking of Petitioner's Property Without Due Process of Law.

The June 30, 2003, order was without Bankruptcy Code authority and therefore void. [*Seymour-Heath v Goggin, supra; In re Continental Airlines Corp., supra; Snell v Cleveland Inc., supra*] By virtue of the prior Settlement Agreement order, at the time of the June 30, 2003, order Petitioner was vested in these assets and retained superior title to said assets. Because the Settlement was a post-petition contract to which Petitioner held personal rights, these property rights were not assets of the bankruptcy estate. [*In re Burgess, supra; In re Babroff, supra.*] In addition, the complaint alleges that the assets at issue were never transferred to the Harris Estate over which the bankruptcy court

acquired jurisdiction. The Record further reflects that Petitioner was deemed by the bankruptcy court to have *no standing* to object to the June 30 order. As a result, even though Petitioner received notice as suggested by the Ninth Circuit, Petitioner was not allowed to be a party to the event.

Because Respondents and the bankruptcy court were acting without authority and entered orders regarding property over which the bankruptcy court had no jurisdiction, their unlawful conduct was a taking of assets from Petitioner without due process of law in violation of the Fifth Amendment to the United States Constitution.

I. Quasi-Judicial Immunity Cannot Attach To Intentional Acts Of Malfeasance Of A Trustee In Bankruptcy.

Had the Ninth Circuit panel been faithful to the well-pleaded complaint doctrine the issue of immunity would not herein be discussed. That stated, since the finding of immunity leaves Petitioner without recourse, it is an issue to be resolved.

In *Mosser v Darrow*, at 274, The Supreme Court reasoned that a trustee could escape personal

liability by requesting instructions from the court *prior to* taking the questioned action.

But, any instruction from the court assumes the bankruptcy court has authority to issue those instructions. The Ninth Circuit opinion assumed the bankruptcy court had authority to issue the June 30, 2003, order. [App. A, p.16676] Based upon this wrongful assumption, the Court then found the necessary elements for Respondents immunity defense. Ignored by the Ninth Circuit is the precedent forbidding this bankruptcy court from issuing the June 30, 2003, order. The order is void. [*Seymour-Heath v Goggin*, supra; *In re Continental Airlines Corp.*, supra; *Snell v Cleveland Inc.*, supra]

This Court has stated that immunity can only protect discretionary conduct vital to the judiciary and not to mandatory ministerial duties- such as carrying out a court ordered settlement agreement [*Antoine v Byers & Anderson, Inc.* 508 U.S. 429, 435-436 (1993). A trustee is immune only for acts within the scope of authority conferred by statute or authority conferred by the power of the bankruptcy court. [*Antoine* at 436]

> "When judicial immunity is extended to officials other than judges, it is because their judgments

are functionally comparable to those of judges..." [*Antoine* at 436]

At the time Respondents did those things described in Petitioner's complaint, the only pending order of the court was the Settlement Agreement. Performing their legal obligations under the Settlement Agreement was ministerial not discretionary. Therefore, quasi-judicial immunity is not a viable defense. The policy behind the grant of quasi-judicial immunity is not furthered when granting immunity for unlawful *ex parte* conduct.

The power of Congress is at the center of jurisdiction over Petitioner's complaint and Respondents' quasi-judicial immunity defense. Petitioner submits that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" [*Granfinanciera* at 51-52]. Taking from Petitioner his right to a jury trial cannot be done by invading the jurisdiction of Art. III courts or wrongfully granting immunity for violations of a fiduciary duty imposed by law.

The Supreme Court has yet to address the scope of immunity attached to wrongful conduct of a bankruptcy trustee. In *Mosser v Darrow*, 341U.S.

267, 274 (1951), the Supreme Court held that a bankruptcy trustee could be held personally liable for willfully and deliberately breaching fiduciary duties. That stated, a patchwork of Circuit opinions has created conflict regarding the proper standard of care to which a trustee is to be held and clarification is needed.

Using the "willfully and deliberately" standard are the Seventh, Sixth and Tenth Circuits [*In re Chicago Pacific Corp.*, 773 F.2d 909, 915 (7th Cir. 1985); *Ford Motor Credit Co. v Weaver*, 680 F.2d 451, 461 (6th Cir. 1982); *Sher v Winkler*, 552 F.2d 1367, 1375 (10th Cir. 1977)]. On the other hand, the Ninth, Second and Eleventh Circuits has imposed personal liability upon a trustee for negligent violations of duties imposed by law [*In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983); *In re Gorski*, 766 F.2d 723, 727 (2nd Cir. 1985); *Red Carpet Corp. v Miller*, 708 F.2d 1576, 1578 (11th Cir. 1983) and the Fifth Circuit requires "gross negligence" to impose personal liability [*In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)] None of these opinions address the power of Congress to authorize bankruptcy courts to issue orders forgiving violations of state law.

Extending its prior "intertwined" theory, the Ninth Circuit has now introduced the concept of a "forgiveness order" that will provide jurisdiction and quasi-judicial immunity to a trustee over willful and deliberate, negligent, or gross negligent violations of a duty imposed by law so long as they occurred *during* the administration of the estate and can be "intertwined" in *any* post accrual order. The Ninth Circuit's intertwined theory is not limited to artificial "sale" orders. This Court should recognize the order in question could just as easily have been a periodic accounting approved by the court.

To protect the trustee from Petitioner's claims, the Ninth Circuit ignored this Court's precedent and created further conflict with other Circuit Court opinion by concluding that the *ex parte* conduct alleged by Petitioner, "were within the scope of her statutory conferred authority as trustee. 11 U.S.C. §704(a)(1)."

The Ninth Circuit's error stems from the misconception that Congress has the power to create a bankruptcy system that allows the offenses Petitioner has described within his complaint. There is no statue created by Congress that gives to a bankruptcy court authority to allow a trustee to

commit malfeasance and *then* give notice to the debtor and creditors of the trustee conduct and *then issue* an order in the form of any court order approving the wrongful conduct. [App. A, p. 16676]

The Ninth Circuit has not only ignored and pardoned the allegations made by Petitioner but has given problem trustees a formula to accomplish violations of their position of trust. In doing so, Petitioner has been denied his right to a jury trial on his common law claims against Respondents.

CONCLUSION

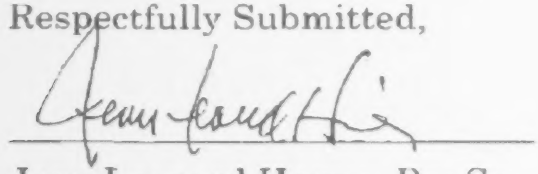
In addition to conflicting with this Court's precedent and a majority of Circuit opinion seeking to preserve Art. III jurisdiction, conflicting with the well-pleaded complaint doctrine and Petitioner's Seventh Amendment rights, the opinion under review is so far departed from accepted judicial thinking that Petitioner requests this Court to exercise its supervisory power to clarify the limitations upon bankruptcy court jurisdiction over post-petition state court claims against a trustee. The opinion under review has created an "intertwined" theory that seriously invades Art. III

jurisdiction by giving that jurisdiction to a bankruptcy court over all claims that accrue during a bankruptcy.

The Ninth Circuit opinion also conflicts with other Circuits that find personal liability when a trustee is negligent or wilful and deliberate in violating fiduciary duties. Congress has not given bankruptcy courts authority to condone or forgive violations of state law which, in turn, deprives Petitioner of his right to an Art. III court and jury.

The petition for writ of certiorari should be granted, the decision of the Ninth Circuit reversed with instructions that no federal jurisdiction exists over Petitioner's complaint.

Respectfully Submitted,



Jean Leonard Harris, Pro Se

Dated: March 4, 2010

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: JEAN LEONARD HARRIS,

Debtor,

JEAN LEONARD HARRIS,
Appellant,
v.

SANDRA WITTMAN, an individual; JACK SWAIN, an individual; PYLE SIMS DUNCAN & STEVENSON, a Professional Corporation; GRANT & ZEKO, a Professional Corporation,
Appellees.

No. 07-56310
D.C. No.
CV-06-01939-WQH

OPINION

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted
November 3, 2009—Pasadena, California

Filed December 21, 2009
Before: Ronald M. Gould and Carlos T. Bea, Circuit Judges, and Donald W. Molloy,* District Judge.
Opinion by Judge Bea

*The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.
[16657]

[16660]

COUNSEL

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OPINION

BEA, Circuit Judge:

Appellant Jean Leonard Harris ("Harris") was the petitioner-debtor in a now-closed Chapter 7 bankruptcy case. Here, he sued the bankruptcy trustee and other estate representatives for breach of contract. Harris alleges the bankruptcy trustee and her agents breached a contract that was entered into during the course of his underlying bankruptcy

case and was directly related to the administration of bankruptcy estate assets.

This appeal requires us to answer whether the bankruptcy court had subject matter jurisdiction over this state law breach of contract claim, and whether the bankruptcy court's approval of the acts Harris now alleges breached the contract entitle the defendants to derived quasi-judicial immunity. We answer yes to both questions and so we affirm.

I. Factual and Procedural History

In July 1999, appellant Harris filed a voluntary petition for bankruptcy relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court, Southern District of California. The bankruptcy court appointed appel- **[16662]** lee Sandra Wittman ("Wittman") as trustee of the bankruptcy estate (the "estate") shortly thereafter.

In March 2000, Wittman filed an adversary proceeding against Harris and his wife, Mrs. Harris, for fraudulent conveyance. Wittman's complaint alleged the transfer from Harris to Mrs. Harris in June 1999—the month before he filed his voluntary bankruptcy petition—of a 1957 Mercedes-Benz, as well as a storage business and related property called Alpine Personal Storage (the "Alpine property"), was voidable and recoverable by the estate.

Trustee Wittman then entered into an Agreement for Use and Assignment of Interests and

Prosecution of Claims (the "Assignment Agreement") with appellee Jack Swain, an unsecured creditor of the estate, which assigned to Swain the right to prosecute the adversary proceeding to set aside the alleged fraudulent conveyance. In exchange, Swain was to be paid 68% of the net recovery he obtained, and to be reimbursed for any of his costs. The Assignment Agreement also specified that Swain's counsel—the law firms of Pyle, Sims, Duncan & Stevenson, APC; and Grant & Zeko, APC (the "Attorney defendants")—would be entitled to recover their attorneys' fees from the estate. Wittman filed a motion for the bankruptcy court to approve the Assignment Agreement and appoint Swain as Special Representative of the estate. Harris received notice of the time and place of the motion. The bankruptcy court granted the motion, specifically approving all aspects of the Assignment Agreement, including the Attorney defendants' attorneys' fees.

In November 2002, Harris, Mrs. Harris, Sandra Wittman, and Jack Swain executed a written agreement that settled all the proceedings in the case (the "Settlement Agreement"). The bankruptcy court approved the Settlement Agreement in January 2003. According to the terms of that agreement, Harris and Mrs. Harris were required to transfer title to the Alpine property and the 1957 Mercedes-Benz to the bankruptcy [16663] estate. However, Mrs. Harris retained an allowed secured claim for $218,000 as a lien against the Alpine property. Further, Wittman was not to sell the Alpine property unless the sale would yield sufficient funds to pay Mrs. Harris's said secured claim in full.

As a final matter, the parties agreed to execute written mutual releases of any and all claims each had against the other that had arisen as of the date of the execution of the Settlement Agreement. A written release between Swain and Wittman, on the one hand, and Mr. and Mrs. Harris, on the other, was executed on November 22, 2002. The written release stated "the Parties agree this Agreement is a complete release of all claims the Parties have against one another arising from the . . . Bankruptcy."

On May 2, 2003, Wittman filed a Notice of Motion and Motion for Sale of Personal Property under 11 U.S.C. § 363(b), seeking an order permitting her to sell the Alpine property and the 1957 Mercedes-Benz to Swain. In support of her motion, Wittman filed a sworn declaration that stated the sale would be in the best interest of the bankruptcy estate because Swain would pay the estate $125,000; pay Mrs. Harris's $218,000 claim at the close of the sale of the Alpine property to satisfy her secured claim against the Alpine property, thereby relieving the estate of this liability; waive Swain's own claims against the estate for his costs and fees from the fraudulent conveyance proceeding; and assume the estate's liability for the attorneys' fees of the Attorney defendants. Altogether, Swain's waiver of claims and assumption of liability totaled around $900,000. Wittman's notice of sale set out a detailed accounting of the source of the estate liabilities that Swain was assuming. As in all noticed bankruptcy motions, Harris received notice of this motion.

The bankruptcy court approved the sale after a hearing on June 30, 2003. The court noted that the sale was free and clear [16664] of Mrs. Harris's secured claim and that Jack Swain was to pay her claim in full at the close of the sale of the Alpine property.[1]

Almost three years later, on May 2, 2006, Harris filed the present suit in California state court in the Superior Court for the County of San Diego. He alleged breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, and constructive fraud. Harris alleged that Wittman, Swain, and the Attorney defendants breached the Settlement Agreement in two ways: (1) by agreeing that Swain and the Attorney defendants were entitled to approximately $1 million in "contrived claims" against the estate stemming from the fraudulent conveyance proceeding because those claims had already been released by the Settlement Agreement, and (2) by Wittman's sale of the Mercedes-Benz and the Alpine property to Swain in exchange for $125,000 and the release of the one million in "contrived claims."

On May 15, 2006, Wittman successfully removed the case to the bankruptcy court that was administering Harris's estate. Harris filed a motion for remand, which was denied. All of the defendants filed motions to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on the

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[1]The record does not establish whether Swain actually paid Mrs. Harris

grounds that: (1) the complaint was barred under the *Barton* doctrine due to Harris's failure to obtain approval of the bankruptcy court prior to filing suit in state court, and (2) each defendant was entitled to derived quasi-judicial immunity as a result of the entry of the June 30, 2003 order, which approved the sale of the assets.

While the motions to dismiss were pending, Harris amended his complaint and eliminated all claims for relief except the breach of contract claim, which remained exactly as it was in the original complaint. **[16665]**

The bankruptcy court dismissed the complaint with respect to each defendant. The court held that (1) Harris's breach of contract claim was a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O); (2) it had jurisdiction over the core proceeding pursuant to 28 U.S.C. § 1334; (3) Harris's complaint had to be dismissed under the *Barton* doctrine because Harris had not sought leave of the bankruptcy court before suing in state court; and (4) Wittman, Swain and the Attorney defendants were entitled to derived quasi-judicial immunity because the bankruptcy court had originally approved all aspects of the sale of the property.

Harris appealed this decision to the United States District Court for the Southern District of California. The district court affirmed on the same grounds. This timely appeal followed.

II. Jurisdiction and Standard of Review

This is an appeal from a final order of the district court affirming the bankruptcy court's grant of defendants' motions to dismiss for failure to state a claim for relief. We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's acceptance of subject matter jurisdiction de novo, while reviewing any factual findings for clear error. *In re Harris Pine Mills*, 44 F.3d 1431, 1434 (9th Cir. 1995). We review de novo the grant of a motion to dismiss for failure to state a claim for relief. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

III. Analysis

A. The bankruptcy court had subject matter jurisdiction to adjudicate Harris's state law contract claim.

A bankruptcy court's jurisdiction is established by statute. 28 U.S.C. § 1334(b) gives federal district courts subject mat- **[16666]** ter jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11."[2] 28 U.S.C. § 157(a) allows district courts to refer any of these proceedings to bankruptcy courts.

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[2]Title 11 of the United States Code contains the entire bankruptcy code. This includes Chapter 7, Chapter 11, and Chapter 13 bankruptcy cases.

[1] However, because bankruptcy judges are not Article III judges, the Constitution limits their ability to adjudicate—i.e., to render a final judgment—to issues that are at the "core" of the bankruptcy power.[3] Because of this limitation, 28 U.S.C. § 157(b)(1) provides bankruptcy judges authority to make binding decisions only in "core proceedings"[4] that arise under or arise in a case under Title 11. A bankruptcy judge may hear a non-core proceeding that is otherwise related to a case under Title 11, but there, the bankruptcy judge

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[3] *See Northern Pipeline Constr Co v Marathon Pipe Line Co*, 458 U S 50 (1982) (plurality opinion) Northern Pipeline filed bankruptcy, and shortly thereafter filed in the bankruptcy court a suit against Marathon for breach of contract relating to a pre-petition contract and pre-petition conduct of Marathon *Id* at 56 Marathon objected to the bankruptcy court's exercise of jurisdiction over the claim because the bankruptcy judges lacked the constitutional protections of Article III—salary protection and life tenure. *Id* at 56-57 The Supreme Court, without majority opinion, held that bankruptcy court jurisdiction over the claim was unconstitutional *Id* at 87 Part of the rationale for the plurality was that Article III required the federal judicial power to be exercised by Article III judges with three exceptions: (1) territorial courts, (2) courts-martial for the military, and (3) disputes involving public rights as opposed to private rights.
Id at 65-70. However, *Marathon* has been interpreted narrowly A majority of the Court in a later case clarified the holding in *Marathon* was only that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a *traditional* contract action arising under state law." *Thomas v Union Carbide Agric Prods Co.*, 473 U S 568, 584 (1985) (emphasis added)

[4] The statute provides a non-exclusive list of core proceedings at 28 U.S C § 157(b)(2)(A)-(P)

may make only proposed findings of fact and conclusions of law to the district judge, who reviews all non-core matters de novo. 28 U.S.C. § 157(c)(1). [16667]

1. Harris's claim arose in his Chapter 7 bankruptcy case; therefore, the bankruptcy court could hear it.

[2] "Arising under" and "arising in" jurisdiction are terms of art. "Congress used the phrase 'arising under title 11' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11." *Harris Pine Mills*, 44 F.3d at 1435. Harris's breach of contract claim is not created or determined by Title 11; it is a common law action, therefore it does not qualify for "arising under" jurisdiction. The bankruptcy court, thus, had authority to hear Harris's claim only if the claim arose in his bankruptcy case. *See* 28 U.S.C. §§ 1334(b) & 157(a).

[3] A civil proceeding "arises in" a Title 11 case when it is not created or determined by the bankruptcy code, but where it would have no existence outside of a bankruptcy case. *Harris Pine Mills*, 44 F.3d at 1435. A state law contract claim could exist independent of a bankruptcy case, but "an action against a bankruptcy trustee for the trustee's administration of the bankruptcy estate could not." *Id.* at 1437.

In *Harris Pine Mills*, the plaintiff sued the bankruptcy trustee and the trustee's agents in Oregon state court. *Id.* at 1434. The plaintiff alleged state law tort claims consisting of fraud, negligence,

and negligent misrepresentation surrounding the trustee's sale of one of the estate assets the plaintiff unsuccessfully attempted to purchase. *Id.* The trustee removed the case to federal district court, and sought to have the case referred to the bankruptcy court. *Id.* Plaintiff objected and moved to remand the case back to state court. *Id.* The district court denied the motion to remand and determined that it had jurisdiction under § 1334(b) because the state law claims arose in the bankruptcy case. *Id.* We affirmed.[5] *Id.* at 1438. **[16668]** Because the plaintiff sued the bankruptcy trustee for the trustee's conduct in administering the bankruptcy estate, the state law claims arose in the bankruptcy case and were subject to federal jurisdiction. *Id.*

[4] Here, although this is a state law cause of action, Harris's claim arose in his bankruptcy case because it could not exist independently of his bankruptcy case. Harris alleged that Wittman, the bankruptcy trustee, breached the Settlement Agreement by selling bankruptcy estate assets that she had agreed not to sell, in exchange for Swain's release of his claims against the estate and his assumption of other estate liabilities that Harris alleges were already released by the Settlement Agreement. Harris's claim is similar to the state law tort claims in *Harris Pine Mills*. Therefore, Harris's state law contract claim arose in his bankruptcy case, and it could be referred to the bankruptcy

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[5]As discussed *infra*, the court also determined that the state law claims were core bankruptcy proceedings. *Harris Pine Mills*, 44 F 3d at 1438

court.

2. This is a "core" bankruptcy proceeding; therefore, the bankruptcy court could make binding determinations.

[5] Core proceedings are listed in the statute at 28 U.S.C. § 157(b)(2). They include but are not limited to: matters concerning the administration of the estate, *Id.* § 157(b)(2)(A); orders approving the sale of property, *Id.* § 157(b)(2)(N); and other proceedings affecting the liquidation of the assets of the estate, *Id.* § 157(b)(2)(O). Subsections (A) and (O) are considered the "catchall" provisions, whereas subsections (B)-(N) are considered the more specific provisions. *In re Castlerock Properties*, 781 F.2d 159, 161 (9th Cir. 1986). "A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157(b)(3). Here, the district court found that Harris's claim was a core bankruptcy proceeding under subsections (A), (N), and (O). However, the district court erred with respect to subsection (N)—*orders* approving the sale of property—because Harris's breach of contract **[16669]** claim does not challenge the bankruptcy court's *order* approving the sale of estate assets. Rather, Harris alleges breaches of contract on the basis of Wittman's conduct in selling the assets, and Swain's and the Attorney defendants' conduct in claiming previously released claims. Thus, there is core jurisdiction only if either subsection (A) or (O) is satisfied.

As discussed above, we concluded in *Harris Pine Mills* that the plaintiff's state law tort claims against the trustee for the trustee's conduct surrounding the sale of estate assets arose in the bankruptcy case. 44 F.3d at 1438. We also concluded that, under subsections (A) and (O), plaintiff's post-petition state law claims asserted against the bankruptcy trustee for conduct inextricably intertwined with the trustee's sale of estate assets were core proceedings. *Id.* We reasoned that the trustee's sale of the bankruptcy estate's assets was a core proceeding because it fell within the literal wording of § 157(b)(2)(A), matters concerning the administration of the estate. *Id.* at 1437; *see also In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987) (holding that a post-petition contract claim arising from the trustee's sale of estate assets "falls within the literal wording of 28 U.S.C. § 157(b)(2)(A) 'matters concerning the administration of the estate,' because it involves a claim that arose out of the administrative activities of [the trustee]").[6]

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[6]In *Arnold Print Works*, the debtor—Arnold Print Works—filed for bankruptcy but continued to manage its property as a debtor-in-possession. 815 F.2d at 167. As part of an effort to administer the estate, Arnold Print Works sold some of its assets—printing rollers—to Apkin. *Id.* Apkin believed that Arnold Print Works had misrepresented the quality of the rollers, and refused to pay $9,000 of the $20,000 purchase price. *Id.* Arnold Print Works sued Apkin in bankruptcy court for breach of contract. *Id.* The First Circuit held that this post-petition state law contract claim was a core proceeding under the literal wording of 28 U.S.C. § 157(b)(2)(A) because the claim arose out of Arnold Print Works' actual administration of the estate in selling assets. *Id.* at 168. The court also concluded that exercising jurisdiction over post-

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[6] The facts in Harris's case are very similar to those in *Harris Pine Mills*. There, the plaintiff alleged the trustee's sale of estate assets was fraudulent. Here, Harris alleges the trustee's sale of estate assets was a breach of contract. Both causes of action arose from the trustee's post-petition conduct pursuant to the trustee's duty to administer the bankruptcy estate. Furthermore, because Swain paid for the assets in part by releasing his claims against the estate, and assuming the estate's liability for the Attorney defendants' attorneys' fees, Swain's and the Attorney defendants' alleged breach of contract in "contriving" those claims was inextricably intertwined with the sale of estate assets. Under *Harris Pine Mills*, therefore, Harris's proceeding is a core proceeding under § 157(b)(2)(A) because the breach of the Settlement Agreement was inextricably intertwined with the sale of estate assets—the literal administration of the bankruptcy estate.

[7] Although *Harris Pine Mills* appears to be directly on point and provides for core jurisdiction, Harris contends that an older Ninth Circuit opinion, *Castlerock*, prevents the conclusion that core jurisdiction exists over a state contract claim where that claim qualifies as a core proceeding only under subsection (A) or (O). In *Castlerock*, the state law contract action was already pending in state court when Castlerock filed for bankruptcy; at that point, the claim was automatically stayed. 791 F.2d at 160.

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petition state law contract claims about the administration of the estate posed no problem under *Marathon*. *Id* at 170-71

The plaintiff filed for relief from the stay, but the bankruptcy court elected to try the claim as well as Castlerock's counterclaims. *Id.* The plaintiff objected to the bankruptcy court's jurisdiction over the state law claims at the pretrial conference, citing the Supreme Court's decision in *Marathon* for the proposition that bankruptcy jurisdiction over the claims was unconstitutional. The bankruptcy court nevertheless tried the state law claims and entered judgment for Castlerock. On appeal, the district court held the bankruptcy court did not have jurisdiction over the claims. *Id.* We affirmed, stating: "we hold that state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are related **[16671]** proceedings under § 157(c) even if they *arguably* fit within the literal wording of the two catch-all provisions, sections § 157(b)(2)(A) and (O)." 781 F.2d at 162 (emphasis added).

Harris contends this precludes core proceeding jurisdiction over his state law contract claim because the claim does not fall within one of the specific provisions of § 157(b)(2)(B)-(N). Harris is correct that core proceeding jurisdiction in his case exists only under the "catchall" provisions (A) and (O), not the specific provision (N), as discussed above. Thus, at first blush, it appears Harris's state law contract claim should not be considered a core proceeding under *Castlerock*, despite the similarity to *Harris Pine Mills*.

[8] However, at second blush, our holding in *Castlerock* is not as broad as Harris contends, and it

certainly does not entirely eliminate subsections (A) and (O) of the statute from ever providing core proceeding jurisdiction to bankruptcy courts over state law contract claims. Rather, our main consideration to reach the holding in *Castlerock* was that "a court should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems." *Id.* Thus, the court concluded the "catchall" provisions should be interpreted narrowly in light of the Supreme Court's decision in *Marathon*. *Id.* Because exercising jurisdiction over the contract claim in *Castlerock* would have posed the same problem as the contract claim in *Marathon*, the *Castlerock* court was "persuaded" that the contract claim did not fall into either subsection (A) or (O) of § 157(b)(2), even if it *arguably* fell within a broad reading of those sections. *Id.* Thus, we held that state law contract claims that only "*arguably* fit within the literal wording of the two catchall provisions" should be considered non-core. *Id.* (emphasis added). Essentially, *Castlerock* holds that, under principles of constitutional avoidance, the otherwise broad "catchall" provisions of bankruptcy court core jurisdiction should be interpreted narrowly, not that there are *no circumstances* under which the "catchall" provisions can provide core jurisdiction. *Id.* at 162; *see In re Mankin*, 823 **[16672]** F.2d 1296, 1301 n.3 (9th Cir. 1987) (stating that *Castlerock* held only that a proceeding should not be characterized as core if to do so would raise constitutional problems and if a proceeding only "arguably" fell within one of the two catchall provisions).

[9] Here, *Castlerock* does not apply. First, Harris's state law contract claim does not *arguably* fall within § 157(b)(2)(A). Rather, our precedent compels the conclusion it *literally* falls within it. As the court in *Harris Pine Mills* noted, the sale of bankruptcy estate assets *is* an administrative activity of the bankruptcy trustee. 44 F.3d at 1437-38; *see also Arnold Print Works*, 815 F.2d at 168 (holding the sale of estate assets falls within the *literal* wording of subsection (A)). Therefore, Harris's claim does not just "relate" to the administration of the estate, his suit necessarily involves how the bankruptcy estate was administered. This is not like the pre-petition contract suits in *Castlerock* and *Marathon* that only *arguably* related to the administration of the estate because one of the parties to the contract was in bankruptcy. *See Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment) ("The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court."). Harris's breach of contract claim arose from the administration of his bankruptcy estate. *Castlerock*, like *Marathon*, involved breach of contract claims that arose before and independent of the administration of bankruptcy assets.

[10] Furthermore, unlike in *Castlerock*, there is no potential Article III problem under the Supreme Court's decision in *Marathon* with the bankruptcy court's exercise of jurisdiction over Harris's post-petition contract claim. There was no majority opinion in *Marathon*. The plurality reasoned that private right suits, as opposed to

public right suits, must be adjudicated by Article III courts, and that "Northern's right to recover contract damages to augment its estate is one of private right." *Marathon*, 458 U.S. at 71 (internal quotation mark **[16673]** omitted). But a majority of the Court in a later case clarified that the holding in *Marathon* was only that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a *traditional* contract action arising under state law." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (emphasis added).

[11] Although the Ninth Circuit has not yet addressed whether post-petition contract claims arising from the trustee's sale of assets pass constitutional muster under *Marathon*, the First Circuit has held that they do. *See Arnold Print Works*, 815 F.2d at 170-71. The *Arnold Print Works* court held "[t]he Constitution permits a non-Article III bankruptcy court to adjudicate post-petition claims related to administration or liquidation of a debtor's estate because the claims are . . . distinguishable from those at issue in *Marathon*." *Id.* at 169. The First Circuit reasoned that the pre-petition "traditional" contract at issue in *Marathon* was distinguishable from a contract entered into post-petition with the bankruptcy trustee and made under the supervision of the bankruptcy court because the latter are not traditional contracts under state law *Id.* at 170. Rather, because the trustee is an officer of the court, and because the contract was approved by the bankruptcy court, such a post-petition contract is much more like a public rights

case than a private rights case. *Id.*

[12] The First Circuit's reasoning is equally applicable here. Harris's contract claim is not a "traditional" contract action because the Settlement Agreement he claims was breached only came into being post-petition and was made with the trustee and Special Representative of the estate. Further, its terms directly related only to the administration of the bankruptcy estate. Harris's claim is thus distinguishable from the suit at issue in *Marathon*, and there is no problem with a bankruptcy court exercising jurisdiction over it. Because there is no constitutional problem under *Marathon*, and because Harris's contract suit more than "arguably" fits within subsec- [16674] tion (A), *Castlerock* does not apply and core proceeding jurisdiction existed under our holding in *Harris Pine Mills*.

B. The district court erred when it dismissed Harris's suit for lack of subject matter jurisdiction under the *Barton* doctrine.

[13] The district court erred when it affirmed the bankruptcy court's dismissal of Harris's suit for lack of subject matter jurisdiction under the *Barton* doctrine, because the *Barton* doctrine is not a ground to dismiss a suit that is proceeding in the appointing bankruptcy court. As applied in the Ninth Circuit, the *Barton* doctrine requires "that a party must first obtain leave of the bankruptcy court before it initiates an action *in another forum* against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official

capacity." *In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005) (emphasis added). Without leave of the court that appointed the trustee (the "appointing court"), "the *other forum* lack[s] subject matter jurisdiction over the suit." *Id.* at 971 (emphasis added). That is to say, "[a] court *other than* the appointing court has no jurisdiction to entertain an action against the trustee for acts within the trustee's authority as an officer of the court without leave of the appointing court." *Id.* at 974 (emphasis added). The rationale for this doctrine is that "[t]he requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought *either* in bankruptcy court or with leave of the bankruptcy court." *Id.* at 971 (emphasis added).

Here, it is undisputed that Harris did not seek leave of the appointing court before filing his claim in state court. As a result, when the case was removed to bankruptcy court, the bankruptcy court held that, under the *Barton* doctrine, even as the appointing court, it did not have subject matter jurisdiction to hear Harris's claim, and so dismissed the suit. [16675]

This was error, however, because, absent leave of the appointing court, the *Barton* doctrine denies subject matter jurisdiction to all forums *except* the appointing court. The *Barton* doctrine is a practical tool to ensure that all lawsuits that could affect the administration of the bankruptcy estate proceed either in the bankruptcy court, or with the knowledge and approval of the bankruptcy court.

The *Barton* doctrine is not a tool to punish the unwary by denying *any* forum to hear a claim when leave of the bankruptcy court is not sought. When Harris's case was removed to the appointing bankruptcy court, all problems under the *Barton* doctrine vanished. Therefore, the district court erred in affirming the bankruptcy court's dismissal of Harris's suit for lack of subject matter jurisdiction under the *Barton* doctrine.

[14] However, this error does not affect the result because we affirm on the alternate ground given by both the district court and the bankruptcy court, that is: All of the defendants are entitled to derived quasi-judicial immunity; therefore, Harris fails to state a claim upon which relief can be granted.

C. Appellees are entitled to derived quasi-judicial immunity.

The district court did not err when it held that Wittman, Swain, and the Attorney defendants were entitled to derived quasi-judicial immunity. "Bankruptcy trustees are entitled to broad immunity from suit when acting within the scope of their authority and pursuant to court order." *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989). Additionally, "court appointed officers who represent the estate are the functional equivalent of a trustee." *Crown Vantage*, 421 F.3d at 973. The doctrine of judicial immunity also applies to court approved attorneys for the trustee. *Smallwood v. United States*, 358 F. Supp. 398, 404 (E.D. Mo. 1973), *aff'd*

mem., 486 F.2d 1407 (8th Cir. 1973). Here, Wittman as trustee, Swain as the functional equivalent of the trustee for the purpose of prosecuting the fraudulent conveyance proceeding, and the Attorney **[16676]** defendants as the court-approved counsel for Swain all qualify for derived quasi-judicial immunity. For derived quasi-judicial immunity to apply, the defendants must satisfy the following four elements: (1) their acts were within the scope of their authority; (2) the debtor had notice of their proposed acts; (3) they candidly disclosed their proposed acts to the bankruptcy court; and (4) the bankruptcy court approved their acts. *Bennett*, 892 F.2d at 823, 825; *see also In re Jacksen*, 105 B.R. 542, 545 (9th. Cir. B.A.P. 1989) (holding a trustee has immunity for actions "within the scope of the authority conferred upon him by statute or the court").

1. Wittman is entitled to derived quasi-judicial immunity.

[15] Harris alleged Wittman breached the Settlement Agreement when she agreed that Swain was entitled to be paid from the estate approximately $1 million in "contrived claims" that had already been released by the Settlement Agreement, and when she sold the assets to Swain in exchange for $125,000 cash and Swain's release of those claims. These acts of Wittman meet all four elements for derived quasi-judicial immunity.

First, Wittman's sale of the estate assets, as well as her determination that the consideration Swain was to pay for those assets was in the best

interest of the estate, were within the scope of her statutorily conferred authority as trustee. 11 U.S.C. § 704(a)(1). Second, Wittman filed notice of the proposed sale, and served Harris with such notice, on May 2, 2003. Third, the notice fully set out the details of the proposed sale of the Alpine property and 1957 Mercedes-Benz to Jack Swain, including the consideration Swain was to pay. The notice explained that Wittman believed the sale was in the best interest of the estate, that Swain was releasing the estate from liability for all the fees and costs associated with his prosecution of the fraudulent conveyance proceeding in his [16677] role as Special Representative of the estate, including the attorneys' fees of the Attorney defendants. The notice also provided a detailed accounting of the source of said fees and costs. Fourth, and finally, the bankruptcy court, after a hearing, approved the sale.

2. Swain and the Attorney Defendants are entitled to derived quasi-judicial immunity.

[16] Harris alleged Swain and the Attorney defendants breached the Settlement Agreement because the approximately $1 million of estate liability—including the Attorney defendants' attorneys' fees from the fraudulent conveyance proceeding, Swain's fees and costs from that proceeding, and Sandra Harris's $218,000 lien against the Alpine property— that Swain was releasing or assuming in exchange for the estate assets had already been released by the terms of the settlement. Thus, Swain and the Attorney defendants were asserting rights to be paid from the

estate, which Harris alleges they had agreed to release. However, Swain and the Attorney defendants, similarly to Wittman, satisfy all four elements for derived quasi-judicial immunity. First, their acts of making claims against the estate for their costs and fees associated with the fraudulent conveyance proceeding were within the scope of the authority conferred to them by the bankruptcy court. Under the Assignment Agreement, Swain was authorized to recover from the estate his costs of prosecuting the estate's fraudulent conveyance proceeding against Harris and Mrs. Harris and 68% of the net recovery from that proceeding. The Attorney defendants were also authorized, under the Assignment Agreement, to recover their fees from the estate. The bankruptcy court specifically approved the Assignment Agreement and therefore authorized their recovery of fees and costs. Second, Harris had notice that Swain and the Attorney defendants were making these claims when Wittman served Harris with notice of the proposed sale on May 2, 2003, which notice included a detailed [16678] account of these claims. Third, the notice fully set out the claims Swain and the Attorney defendants had against the estate and the source of all of their claims. Fourth and finally, after a hearing, the bankruptcy court approved all of these claims, and Swain's release or assumption of those claims in exchange for the Alpine property.

[17] Thus, all of the appellees are entitled to derived quasijudicial immunity.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In Re: JEAN LEONARD HARRIS, Debtor.	Civil No. 06cv1939 WGH (RBB) Bankruptcy No. 99-32841-B7 Bankruptcy Adversary No. 06-90289
JEAN LEONARD HARRIS, an individual, Appellant, v. SANDRA WITTMAN, an individual; JACK SWAIN, an individual; PYLE, SIMS, DUNCAN & STEVENSON, a professional corporation; GRANT AND ZEKO, a professional corporation; and DOES 1 TO 10, Inclusive, Appellees.	**ORDER**

HAYES, Judge:

The matter before the Court is the appeal of

the Bankruptcy Court's dismissal of a breach-of-contract action originally filed in state court by Appellant Jean Leonard Harris.

I. Background

On July 26, 1999, Appellant Jean Leonard Harris filed a voluntary Petition for Bankruptcy under Chapter 7 of the United States [1] Bankruptcy Code in United States Bankruptcy Court, Southern District of California, Case No. 99-32841-B7 ("Bankruptcy Case"). (Record on Appeal ("ROA") 779-80.) The Bankruptcy Case created an estate (the "Bankruptcy Estate") consisting of, among other things, all claims and causes of action against third parties. *See* 11 U.S.C. § 541.

Appellee Sandra Wittman was appointed Chapter 7 Interim Trustee on July 29, 1999. (ROA 782.) On March 21, 2000, Wittman filed a "Complaint for Turnover of Property; Avoidance of Fraudulent Conveyances; Avoidance of Liens; Avoidance of Preferential Transfers; Avoidance of Post-Petition Transfer; Conspiracy; Declaratory Relief; and Injunctive Relief" in Adversary Proceeding No. 00-90157 (the "Adversary Proceeding"). (ROA 821-46.) Among the Defendants in the Adversary Proceeding were Harris and his wife, Sandra Harris. (ROA 821-46, 898.) In the Adversary Proceeding Complaint, Wittman alleged that the transfer from Harris to his wife of, among

other assets, Quatre Corporation stock,[1] and a business and related property known as "Alpine Personal Storage" (the "Alpine property"), was voidable and recoverable by the Bankruptcy Estate as a fraudulent transfer of property. (ROA [illegible]-46.)

In July 2000, Wittman and Appellee Jack Swain, a creditor of the Bankruptcy Estate,[2] entered into an "Agreement for Use and Assignment of Interests and Prosecution of Claims" (the "Swain Agreement"). (ROA 852-69.) Under the Swain Agreement, Swain was to prosecute the Adversary Proceeding as the Special Representative of the Bankruptcy Estate, in exchange for which he would receive reimbursement of his costs and expenses, and would retain a percentage of the net recovery from the Adversary Proceeding. (ROA 855-56.) On July 14, 2000, Wittman filed a Motion of the Trustee to Assign Claims to Jack Swain as Special Representative. On November 6, 2000, the Court entered an order approving the assignment. (ROA 848-69.)

On November 19, 2002, the Bankruptcy Court advised the parties that it was granting Swain's

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[1] Prior to July 21, 1999, Harris was sole shareholder of Quatre Corporation (ROA 452.)

[2] On July 19, 1999, Swain obtained a judgment against Harris in state court. (ROA 452.) Harris filed the Petition for Bankruptcy a week later. (ROA 779-80.)

motion for summary judgment. (ROA 895.) After the Court's ruling, the parties [2] reached a settlement of the entire Adversary Proceeding. (ROA 897-907.) Appellees Pyle Sims Duncan & Stevenson, Peter Duncan, Grant & Zeko and Miles Grant signed the Stipulation for Settlement as the attorneys for Swain. (ROA 900.) The Stipulation for Settlement and the Settlement Agreement were approved by the Bankruptcy Court on January 8, 2003. (ROA 923-26.) Under the Stipulation for Settlement, Sandra Harris and/or Harris were required to transfer, *inter alia*, all outstanding shares of the Quatre Corporation, all outstanding shares of the Unicus Corporation, title to the Alpine property and a 1957 Mercedes-Benz automobile to the Bankruptcy Estate. (ROA at 901, 903.)

On May 2, 2003, Wittman filed a Motion for Sale of Personal Property under 11 U.S.C. Section 363(b), seeking Bankruptcy Court approval for the sale of the certain assets of the Bankruptcy Estate to Swain, including stock of Unicus Corporation and the 1957 Mercedes-Benz.[3] (ROA 938-49.) In an affidavit in support of the Motion, Wittman stated that it would be in the best interest of the Bankruptcy Estate to sell certain assets, including the Unicus Corporation stock and the Mercedes, to

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[3]The Unicus Corporation owned the Alpine Property (ROA 13, 499, 951-56, 963.)

Swain in exchange for a waiver of claims and cash consideration. (ROA 951-56.) On May 16, 2006, Harris filed an opposition brief, arguing that the Motion "is forbidden by the clear terms of the November 19, 2002, Settlement Agreement," and the "Motion is a sham transaction wherein Swain has concocted imaginary consideration to steal away the assets of the bankruptcy estate." (ROA 961, 966.) On June 30, 2003, the Bankruptcy Court issued an Order Approving Trustee's Motion for Sale of Personal Property under 11 U.S.C. Section 363(b) (the "June 30 Order"). In the June 30 Order, the Bankruptcy Court approved the sale of the stock of Unicus Corporation to Swain, finding that Swain was a buyer in good faith pursuant to 11 U.S.C. § 363(m) and that the sale of the Unicus Corporation stock is retroactive, such that the Unicus stock was never part of the Bankruptcy Estate within the meaning of 11 U.S.C. § 541. (ROA 968-77.)

Harris appealed the June 30 Order to this Court. On October 22, 2003, this Court (Huff, Judge) dismissed the appeal, finding that Harris' appeal was moot because Harris had failed to seek a stay of the June 30 Order as required by 11 U.S.C. § 363(m). (ROA 995-98.) Harris [3] argued that the sale of the Unicus stock was invalid and outside the protection of § 363(m) because Swain was not a good faith purchaser, specifically arguing that Swain did

not pay value for the stock, and Swain and the trustee colluded to perpetrate a fraud on the Estate and the other creditors. (*Id.*) Judge Huff affirmed the Bankruptcy Court's factual findings that the sale was entered into without collusion, that the sale was in the best interest of the Estate, and that Swain was a good faith purchaser. (*Id.*) On February 28, 2005, the Ninth Circuit affirmed Judge Huff's dismissal of Harris' appeal of the June 30 Order. (ROA 1016-18.)

On May 2, 2006, Harris filed a complaint in the Superior Court for the County of San Diego, State of California (the "Complaint"), naming all Appellees as defendants. (ROA 47-63.) The Complaint included claims for relief for breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation and constructive fraud. (*Id.*) Harris did not seek or obtain the permission of the Bankruptcy Court prior to filing the Complaint or at any time thereafter. (ROA 1247.) In the Complaint, Harris alleged: "Because the allegations herein are *ultra vires* to the duties of these Defendants to Plaintiff's bankruptcy Estate, not capable of being authorized by the bankruptcy court, and beyond the jurisdiction of the bankruptcy court to adjudicate, no prior approval of the bankruptcy court is needed to bring these allegations against these Defendants in this Court." (ROA 48.)

On May 15, 2006, Wittman removed the case from state court to the Bankruptcy Court as adversary proceeding No. 06-90289-PB7. (ROA 385-86.) On June 7, 2006, Harris filed a motion for remand. (ROA 106-16.) The Bankruptcy Court denied the motion on July 17, 2006. (ROA 1080.)

On June 12, 2006, Harris had filed a motion to withdraw the reference with this Court, seeking an order withdrawing the referral of the case to the Bankruptcy Court. On August 16, 2006, this Court (Moskowitz, Judge) ruled that federal subject matter jurisdiction existed, and denied Harris's motion for withdrawal of the reference. (ROA 1477-81.)

All Appellees filed motions to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6), on the grounds that, *inter alia*: (1) the Complaint is barred due to the failure of Harris to seek approval of the Bankruptcy Court prior to filing it; and (2) each **[4]** Appellee is entitled to derived quasi-judicial immunity as a result of the entry of the June 30 Order (ROA 150-218, 1337-1356.)

On July 21, 2006, while the motions to dismiss were pending, Plaintiff filed a First Amended Complaint ("FAC"), which dismissed all claims for relief except for the breach of contract claim. (ROA 8-44.) The breach of contract claim

remained unchanged from that in the original Complaint. Specifically, the FAC alleges that the Appellees breached the Settlement Agreement and the Stipulation for Settlement by "contriving" claims for fees and costs, and Appellees "then transferred the Alpine Property [i.e., the Unicus stock] to themselves, as consideration for assuming their contrived claims against [the Bankruptcy] Estate, and did so *nunc pro tunc* such that [the Bankruptcy] Estate never received any income from the Alpine property or any benefit from the settlement agreement." (ROA 13.)

Following oral argument on the motions to dismiss, the Bankruptcy Court issued orders dismissing the action with respect to each of the Appellees. In granting Wittman's Motion to Dismiss, the Bankruptcy Court made the following written conclusions of law:

1. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(A)(N) and (O). The statutory predicates for the relief reque in the Motion are Federal Rules of Bankruptcy Procedure Rule 7012 and Federal Rules of Civil Procedure Rule 1
2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U. 1334.
3. Wittman was the duly appointed truste the Bankruptcy Estate, and was author

pursue the Adversary Proceeding and comply with the Order.

4. Plaintiff did not first seek leave from this appointing Court before suing Wittman, and no applicable exception allowing suit without such leave exists. Consequently, the Court lacks subject matter jurisdiction, and dismisses this action pursuant to Federal Rules of Bankruptcy Procedure Rule 7012 and Federal Rules of Civil Procedure Rule 12(b)(1) and 12(h)(3). *In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005); *In re Kashani,* 190 B.R. 875, 885 (9th BAP 1995).

5. Wittman is entitled to derived quasi-judicial immunity as a result of her actions taken in connection with the sale of the stock of Unicus Corporation to Swain pursuant to the Order. As a result, the Complaint fails to state a claim for relief against Wittman and the Court dismisses this action on an alternative basis pursuant to Federal Rules of Bankruptcy Procedure Rule 7012 and Federal Rules of Civil Procedure Rule 12(b)(6).

(ROA 1281-82.) The Bankruptcy Court's orders granting the other motions to dismiss were based on the same grounds. (ROA 1240-48 (adding: "Under the Agreement, Swain was the [5] agent of Wittman and the Bankruptcy Estate in pursuing the Adversary Proceeding and in complying with the Order. Under the Agreement, Movant was the agent of Swain in prosecuting the Adversary Proceeding and in complying with the Order."), 1275-92, 1429-30.)With respect to the law firms, the Bankruptcy Court also stated:

> 6. Movant was not a party to the Stipulation for Settlement or the Settlement Agreement. The Complaint's sole claim for relief, after amendment, is for breach of contract. As a result, the Complaint fails to state a claim for relief against Movant and the Court dismisses this action on an alternative basis pursuant to Federal Rules of Bankruptcy Procedure Rule 7012 and Federal Rules of Civil Procedure Rule 12(b)(6).

(ROA 1248; *see also* ROA 1291-92.)

On August 23, 2006, Harris filed a Notice of Appeal. (Doc. # 1.) On August 30, 2006, one of the Appellees elected to have this appeal heard by this Court. (*Id.*) After receiving briefing from the parties, the Court heard oral argument on May 10, 2007.

II. Discussion

A. Statutory Basis for Appeal

This appeal is taken pursuant to 28 U.S.C. § 158, which states: "The district courts of the United States shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." 28 U.S.C.§ 158(a).

B. Standard of Review

"Removal of a case from state court to federal court raises questions of federal subject matter jurisdiction which are reviewed *de novo*. The party seeking removal has the burden of establishing federal jurisdiction, and normally, the existence of federal jurisdiction on removal must be determined from the face of plaintiff's complaint." *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 934 (9th Cir. 1993) (quotation and citations omitted). Also, this Court reviews *de novo* a bankruptcy court's decision to dismiss a complaint pursuant to Federal Rule of Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure 12(b)(6). *See In re Stoll*, 252 B.R. 492, 495 (9th Cir. BAP 2000). "When [6] considering a motion to dismiss for

failure to state a claim, a court must take as true all allegations of material fact and construe them in a light most favorable to the nonmoving party." *Id.* (citation omitted); *see also Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*,416 F.3d 940, 946 (9th Cir. 2005). "On a motion to dismiss, [a court] may take judicial notice of matters of public record outside the pleadings." *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (citations omitted); *see also U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue").

C. Subject-Matter Jurisdiction

The Bankruptcy Court found that this action is a core proceeding pursuant to 28 U.S.C.§ 157(b)(2)(A), (N) and (O), and that it had subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1334.

"[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). "Congress used the phrase 'arising under title 11' to describe those proceedings that involve a cause of action

created or determined by a statutory provision of title 11. . . . The meaning of 'arising in' proceedings is less clear, but seems to be a reference to those 'administrative' matters that arise only in bankruptcy cases. In other words, 'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995) (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)). "If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but . . . it is an 'otherwise related' or non-core proceeding." *Id.* (quoting *Wood*, 825 F.2d at 97). "[C]laims that arise under or in Title 11 are deemed to be 'core' proceedings, while claims that are related to Title 11 are 'noncore' proceedings." *Id.* (citing *Robertson v. Isomedix, Inc.*, 28 F.3d 965, 969 (9th Cir. 1994) ("Core [7] proceedings are matters concerning the administration of the estate and rights created by title 11.")).[4]

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[4]The distinction between core and noncore is important, because it determines how the claims must be treated In noncore matters, the bankruptcy court acts as an adjunct to the district court, in a fashion similar to that of a magistrate or special master In noncore matters, the bankruptcy court may

In *Harris Pine Mills*, the plaintiff sued the trustee and the trustee's agents in state court for fraud, negligence, and negligent misrepresentation relating to the plaintiff's purchase of a division of the corporate debtor. The trustee removed the action to state court, and plaintiff filed a motion for remand which the district court denied. The Ninth Circuit affirmed the district court's ruling that the plaintiff's post-petition claims were core proceedings subject to federal jurisdiction: "Plaintiffs' postpetition state law claims asserted against the bankruptcy trustee and his agents for conduct inextricably intertwined with the trustee's sale of property belonging to the bankruptcy estate involved a core proceeding subject to federal jurisdiction." *Id.* at 1438. In so holding, the Ninth Circuit noted that "the clear majority of decisions from other courts that have touched on this issue hold that post petition state law claims asserted by or against a trustee in bankruptcy or the trustee's

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not enter final judgments without the consent of the parties, and its findings of fact and conclusions of law in noncore matters are subject to de novo review by the district court . . . In contrast to the bankruptcy court's authority in noncore cases, the bankruptcy court may enter final judgments in so-called core cases, which are appealable to the district court. . . . The standard for appeal of core matters [to] the district court is the same as in other civil matters appealed from the district court to the circuit courts of appeal *In re Harris Pine Mills*, 44 F 3d at 1436 (citing 28 U S C § 158(c))

agents for conduct arising out of the sale of property belonging to the bankruptcy estate qualify as core proceedings." *Id.* at 1437.

Similarly, Harris' breach of contract claim in the FAC arises at least in part from the sale of the Unicus stock.[5] (ROA 13.) As in *Harris Pine Mills*, Harris' post-petition state-law breach of contract claim is asserted against the bankruptcy trustee and her agents for conduct inextricably intertwined with the sale of property belonging to the Bankruptcy Estate. Therefore, this action is a core proceeding subject to federal jurisdiction. *See In re Harris Pine* [8] *Mills*, 44 F.3d at 1438; *cf.* 28 U.S.C. § 157(b)(2)(N) ("Core proceedings include, but are not limited to . . . orders approving the sale of property. . . .").

Harris disputes that federal jurisdiction exists. He argues that the Bankruptcy Court did not retain jurisdiction over the Settlement Agreement, and therefore the Bankruptcy Court had no jurisdiction over his state law claim that the Appellees breached the Settlement Agreement. He relies upon *In re Valdez Fisheries Development Association*, 439 F.3d 545 (9th Cir. 2006) in support of his argument. *Valdez Fisheries* involved a lawsuit

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[5]As noted above, Unicus Corporation was the sole owner of the "Alpine property" referenced in the FAC (ROA 13, 499, 969.)

between creditors, which involved interpretation of a settlement agreement between the debtor and one of the creditors. The Ninth Circuit did not address the issue of core jurisdiction, but held that no "related to" jurisdiction or ancillary jurisdiction existed, in part because the bankruptcy court did not retain jurisdiction over the settlement agreement. *See id.* at 547-50 (citing, *inter alia*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-82 (1994)). At minimum, *Valdez Fisheries* is inapposite because it did not involve a trustee and/or a trustee's representative(s) being sued in state court. As the Ninth Circuit earlier noted in *Harris Pine Mills*: "Most cases involving claims against bankruptcy trustees sued in state court appear to have resulted in the trustees' successful removal of the actions to federal district court. Cases finding state law claims to be noncore proceedings, however, do not involve trustees as defendants." *Harris Pine Mills*, 44 F.3d at 1437 n.10 (citations omitted).

This action is a core proceeding for the additional reasons that (1) the FAC alleges that absent the alleged misconduct by Appellees, there would have been more assets available to the Bankruptcy Estate (ROA 12-14), and (2) the FAC alleges that the Appellees' "contrived claims . . . were for pre-trial commissions, before and after trial

attorney fees, pretrial costs, witness fees, recovery costs, pretrial and post trial associate counsel costs and trustee fees" (ROA 12-13). As stated by Judge Moskowitz when denying Harris' motion for withdrawal of the reference to the Bankruptcy Court:

> I agree with [Bankruptcy Court] Judge Bowie . . . where Judge Bowie found under 1334 that there was jurisdiction. . . . And I also agree that this was a core matter, under three provisions. Under 28 U.S.C. Section [157(b)(2)(A)] because it involves . . . matters concerning the administration of the estate; and two, it involves legal fees that lawyers would otherwise have to apply to get approval of from the bankruptcy estate, and also [9] the rights and liabilities and duties of the bankruptcy trustee. Also under [§ 157(b)(2)(E)], orders the turnover of property to the estate. That is essentially what this is . . an order that they shall receive the real property. The parties made it into an order by having Judge Bowie so order the settlement. And then, finally, [§157(b)(2)(O)] which has been known as the catch-all provision, 'other proceedings affecting the liquidation of the assets of the estate.'

(ROA 1477-78.)[6]

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[6]Title 28, Section 157(b) provides in part

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate,

Similarly, the Bankruptcy Appellate Panel ("BAP") for the Ninth Circuit held in *Honigman, Miller, Schwartz & Cohn v. Weitzman* (*In re DeLorean Motor Co.*), 155 B.R. 521 (9th Cir. BAP 1993) that state law claims against a trustee and the trustee's attorneys constituted a core proceeding subject to federal jurisdiction. In *Honigman*, the trustee in bankruptcy filed suit against John DeLorean and his attorney, Howard Weitzman, alleging a fraudulent transfer involving millions of dollars from DeLorean to Weitzman. DeLorean and the trustee settled their dispute and the trial court later ruled in favor of Weitzman in the trustee's lawsuit. Weitzman then brought a malicious prosecution action in state court against the trustee and the attorneys retained by the trustee to litigate the fraud action. The BAP stated: "Although the Weitzman action asserts a state law claim, as the functional equivalent of an action against the trustee, it is inextricably tied to the determination of an administrative claim against the estate and is similarly tied to questions concerning the proper

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(E) orders to turn over property of the estate,

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims

28 U S C § 157(b)(2)

administration of the estate. For these reasons, we determine that Weitzman's action against Schade and the Honigman defendants is within the scope of 28 U.S.C. § 1334(b) and a core proceeding within the scope of 28 U.S.C. § 157(b)." *Honigman, Miller, Schwartz & Cohn*, 155 B.R. at 525. As in *Honigman*, Harris' state law claim against the Appellees is "the functional equivalent of an action against the trustee," and "is . . . tied to questions concerning the proper administration of the estate." *Id.* [10]

The Court finds that the Bankruptcy Court properly determined that subject-matter jurisdiction exists pursuant to 28 U.S.C. § 1334(b), and that this case is a core proceeding under 28 U.S.C. § 157(b).

D. Barton Doctrine

The Bankruptcy Court dismissed Harris' action because "Plaintiff did not first seek leave from this appointing Court before suing Wittman, and no applicable exception allowing suit without such leave exists." (ROA 1282.) This was an application of the "*Barton* doctrine,"[7] which, as applied by the Ninth Circuit, provides: "[A] party

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[7]"The *Barton* doctrine takes its name from *Barton v. Barbour*, 104 U S 126, 26 L Ed 672 (1881), in which the Supreme Court ruled that the common law barred suits against receivers in courts other than the court charged with the administration of the estate The Supreme Court held in *Barton* that, before suit is brought against such a receiver, leave of the court by which the trustee was appointed must be obtained " *In re Crown Vantage, Inc*, 421 F 3d 963, 970 n.4 (9th Cir 2005)

must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity." *In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005) (citing, *inter alia*, *In re Kashani*, 190 B.R. 875, 883-85 (9th Cir. BAP 1995)). "The essence of the *Barton* doctrine is that parties may not commence or maintain unauthorized litigation. The only appropriate remedy, therefore, is to order cessation of the improper action." *Id.* at 976. The protection afforded by the *Barton* doctrine extends to others appointed by the bankruptcy court, including the trustee's counsel. *See In re Balboa Improvements, Ltd.*, 99 B.R. 966, 970 (9th Cir. BAP 1989); *see also In re DeLorean Motor Co.*, 991 F.2d 1236, 1240-1241 (6th Cir. 1993) ("We hold, as a matter of law, counsel for trustee, court appointed officers who represent the estate, are the functional equivalent of a trustee, where as here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets. . . . The protection that the leave requirement affords the Trustee and the estate would be meaningless if it could be avoided by simply suing the Trustee's attorneys. Therefore, leave of the Bankruptcy Court must be granted before a suit may be brought against

counsel for trustee, in their capacity as counsel for trustee, since such suit is essentially a suit against the trustee."). [11]

It is undisputed that Harris failed to obtain leave of the Bankruptcy Court prior to suing Appellees. Harris argues that his failure to obtain leave is excused by the exceptions to the *Barton* doctrine. There are two exceptions to the *Barton* doctrine. First, leave of the bankruptcy court is not required "when a trustee acts in excess of his authority and is sued in a state court for such acts." *Leonard v. Vrooman*, 383 F.2d 556, 560 (9th Cir. 1967) (holding that "a trustee wrongfully possessing property which is not an asset of the estate may be sued for damages arising out of his illegal occupation in a state court without leave of his appointing court"); *see also In re Balboa Improvements, Ltd.*, 99 B.R. at 970. Here, the settlement and subsequent sale of the property at issue in the FAC was expressly approved by the Bankruptcy Court. (ROA 968-70 (order approving sale of the Unicus Corporation stock), 935-36 (order approving sale of the Mercedes Benz automobile).) The Bankruptcy Court expressly found that Swain's purchase of the Unicus Corporation stock was in "good faith," within the meaning of 11 U.S.C. §363(m). (ROA 969.) This finding was affirmed by both this Court and the Ninth Circuit. (ROA 995-98,

1016-18.) Inherent in the Bankruptcy Court's orders is that the sale and the fees associated with the sale--which were disclosed to the Bankruptcy Court (ROA 938-49, 951- 56)--were within the scope of the trustee's authority. *See In re Martin*, 287 B.R. 423, 435 (Bankr. E.D. Ark. 2003) (holding that "[b]ecause the Court approved the settlement reached by the Trustee, and the order approving the settlement has been upheld repeatedly despite Debtor's numerous collateral attacks," "[t]he Court finds that the acts complained of are in fact within the scope of the Trustee's authority, and as such, leave is required for Debtor or her parents to sue the Trustee or his attorney in another forum"). If, in circumstances such as are present here, a party could evade the requirements of the *Barton* doctrine simply by alleging that the trustee and/or her agents acted outside the trustee's authority, then the exception would swallow the rule.

The second exception to the *Barton* doctrine is codified in 28 U.S.C. § 959, which provides in part: "Trustees . . . may be sued, without leave of the court appointing them, with respect to any of their acts of transactions in carrying on business connected with such **[12]** property." 28 U.S.C. § 959(a). As explained by the Ninth Circuit:

> By its terms, this limited exception applies only if the trustee or other officer is actually operating the business, and only to acts or

> transactions in conducting the debtor's business in the ordinary sense of the words or in pursuing that business as an operating enterprise. Section 959(a) does not apply to suits against trustees for administering or liquidating the bankruptcy estate. Actions taken in the mere continuous administration of property under order of the court do not constitute an 'act' or 'transaction' in carrying on business connected with the estate.

In re Crown Vantage, Inc., 421 F.3d at 971-72 (quotations omitted) (noting that "[t]he few examples of suits that have been allowed under § 959(a) include a wrongful death action filed against an operating railroad trustee and suits for wrongful use of another's property"); *see also In re DeLorean Motor Co.*, 991 F.2d at 1241 ("This exception does not apply to suits against the trustee for actions taken while administering the estate. Merely collecting, taking steps to preserve, and/or holding assets, as well as other aspects of administering and liquidating the estate, do not constitute 'carrying on business' as that term has been judicially interpreted.") (citation omitted); *In re Balboa Improvements*, 99 B.R. at 970 ("This section was intended to permit actions redressing torts committed in furtherance of the debtor's business. However, this section was not intended to apply to a breach of a fiduciary duty in the administration of a

bankruptcy estate. The bankruptcy court is responsible for resolving issues affecting the administration of the estate.").

In the FAC, Harris alleges that "Wittman failed to perform her obligations to receive and carry on the storage and related businesses associated with the Alpine Property, and do so in at least the same manner as [Harris] would have so managed for the benefit of the remaining creditors and for himself, all as required by the Settlement Agreement, the Mutual Release, California Law and 28 U.S.C. § 959." (ROA 14.) Harris further alleges that Appellees "transferred the Alpine Property to themselves . . . and did so *nunc pro tunc* such that [Harris]' Estate never received any income from the Alpine Property . . . . [Appellees] then *immediately* sold [Harris]' assets for approximately $3,500,000 and distributed the profit among themselves." (ROA 13 (emphasis added).)

The allegations of the FAC do not support the contention that the suit is based upon the Appellees' "acts of transactions in carrying on business connected with [the Alpine] property." **[13]** 28 U.S.C. § 959(a). In deciding whether "the facts and the remedy sought by the Appellant fall within the narrow parameters of § 959(a) and outside the jurisdiction of the bankruptcy court over the administration of the estate," the Court focuses on

"the main purpose of the suit." *In re Balboa Improvements*, 99 B.R. at 970. The main purpose of Harris' suit is to seek damages caused by Appellees' alleged misconduct in the administration the Bankruptcy Estate, especially, Appellees' failure to transfer the property at issue to the Bankruptcy Estate. (ROA 8-15.) The alleged breach of contract was not premised on an act or transaction of Appellees in carrying on the business at the Alpine property. Therefore, § 959(a) is not applicable.

This Court affirms the Bankruptcy Court's dismissal of Harris' action because "Plaintiff did not first seek leave from this appointing Court before suing Wittman, and no applicable exception allowing suit without such leave exists." (ROA 1282.)

E. Immunity

The Bankruptcy Court dismissed Harris' action on the alternate grounds that Appellees are entitled to derived quasi-judicial immunity from Harris' suit. (*See, e.g.*, ROA 1281-82.)

"The Trustee is immune for actions that are functionally comparable to those of judges, i.e., those functions that involve discretionary judgment." *In re Castillo*, 297 F.3d 940, 947 (9th Cir. 2002) (citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993)). "Although, like the common-law bankruptcy judicial officers, the trustee

is charged with many legal, adjudicative, clerical, financial, administrative, and business functions, quasi-judicial immunity attaches to only those functions essential to the authoritative adjudication of private rights to the bankruptcy estate. Therefore we must examine the particular function here at issue." *Id.* at 951 (holding that a bankruptcy trustee is entitled to quasi-judicial immunity for both scheduling and noticing the confirmation hearing because "the scheduling and giving of notice of hearings are part of the judicial function of managing the bankruptcy court's docket in the resolution of disputes. This function is unquestionably discretionary in nature."); *cf. Antoine*, 508 U.S. at 432-36 (holding that a court reporter who was required to record court proceedings verbatim could not claim judicial immunity because his duties were not discretionary). "This protection [afforded by the immunity doctrine] extends to other **[14]** bankruptcy court appointees, including counsel for the trustee." *In re Bay Area Material Handling, Inc.*, 1995 WL 747954, at *5 (N.D. Cal., Dec. 6,1995) (citing *Smallwood v. United States*, 358 F. Supp. 398, 404 (E.D. Mo. 1973), aff'd mem., 486 F.2d 1407 (8th Cir. 1973)).

The allegations in the FAC concern the trustee and the trustee's agents performing the

following functions: entering into the Settlement Agreement, transferring and selling assets of the Estate, and making claims for fees and costs. (ROA 10-14.) These functions are "essential to the authoritative adjudication of private rights to the bankruptcy estate." *In re Castillo*, 297 F.3d at 951 ("[Q]uasi-judicial immunity attaches to only those functions essential to the authoritative adjudication of private rights to the bankruptcy estate."). Therefore, the Appellees are entitled to quasi-judicial immunity from Harris' suit.

This conclusion is bolstered by the fact that, as set out above, Wittman and Swain obtained Bankruptcy Court approval for the settlement as well as the disposition of the assets at issue in the FAC, after disclosure to the Bankruptcy Court of, *inter alia*, the alleged "contrived claims" for fees and costs (ROA 938-49, 951-56). *See In re Jacksen*, 105 B.R. 542, 545 (9th Cir. BAP 1989) ("[A] trustee, who obtains court approval for actions under the supervision of the bankruptcy judge, is entitled to derived immunity.") (citations omitted).

The Bankruptcy Court's dismissal of Harris' suit is affirmed on the alternate basis of quasi-judicial immunity.

III. Conclusion

For the foregoing reasons, this Court **AFFIRMS** the orders of the Bankruptcy Court dismissing Harris' suit. The Clerk of the Court shall enter Judgment in favor of Appellees and against Appellant.

DATED: August 21, 2007

WILLIAM Q. HAYES
United States District Judge